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NOTES OF INDIAN CASES.

Nobin Chandra Barua v. Chandra Madhab Barua. I. L. R. 44 Cal. 1 (P. C.)

In more than one case the Calcutta High Court has placed a wide construction on the language of the 3rd column of Art. 89 of the Limitation Act, practically holding that mere neglect or omission on the part of the agent to comply with a demand from the principal, amounts to refusal within the meaning of that article. The spirit of the present decision of their Lordships in which stress is laid upon the requisite of refusal as much as on demand seems to us inconsistent with the above view of the High Court.

The observation towards the end of their Lordships' judgment on the question raised under S. 8 of the Limitation Act (of 1877) is apt to be misunderstood if it is not borne in mind that the family of the parties was one governed by the Dayabhaga Law. This circumstance is not referred to in the judgment but may be gathered from the report of the arguments in the unofficial reports. In the case of a Mitakshara family it is fairly well settled, so far at any rate as the Madras Court is concerned, that the senior male member, if of age, can give a discharge so as to bind his undivided minor brothers and thus if he is barred the minors also will be barred.

One question of procedure arising on their Lordships' judgment deserves a passing notice. With reference to a portion of the agency period their Lordships felt themselves unable to grant any relief as the appellant had not filed a cross appeal in the High Court in respect of the same against the adverse decision of the Subordinate Judge. It would seem as if their Lordships were governing themselves by the Code of 1882. But the appeal to the High Court in connection with which the omission complained of occurred was one of 1910 and though the original suit was one of 1904 we do not see why the present question as one merely

of *procedure* should not be held to be governed by the code of 1908 which had come into force at the time that the case came up on appeal to the High Court. There seems to have been an earlier appeal in 1907. But that is immaterial for the present purpose as the whole case was then remanded to the court of first instance. If the new code applied the language of Or. 41. rr. 33 is wide enough to justify the High Court in passing the proper decree even in the absence of a cross appeal and their Lordships may well have done the same thing. Even under the Code of 1882 a memorandum of objections has sometimes been considered unnecessary and the appellate court has interfered to give proper relief especially as between Co-respondents. But on that point there has been considerable difference of judicial opinion.

Shama Kanta Chatterji and Co. *v.* **Kusum Kumari** I. L. R. 44 Cal. 10.

There can be no dispute as to the correctness of the decision in this case, but we venture to doubt the soundness of the opinion indicated by the learned judge, in the course of his judgment, in respect of a slightly different class of cases. Taking it as a common ground that only part of the cause of action having arisen within the jurisdiction, a suit will not lie in the High Court except on leave obtained, the learned judge proceeds to consider what conduct on the part of the defendant subsequent to institution of the suit will disentitle him to rely on this plea; and in this connection he draws a distinction between cases in which the plaint itself alleges that only part of the cause of action arose within the jurisdiction, and those in which the plaint proceeds on the footing that the whole cause of action arose within the jurisdiction though as a matter of fact it was not so. "In the first case" says the learned judge "the defendant may by appearing and pleading waive the objection to the jurisdiction." But in the second he seems to think no such waiver or estoppel can be founded on his omission to plead to the jurisdiction. In the particular case itself an issue as to jurisdiction had actually been raised, but other issues of fact and law had also been raised. It is not easy to see how the mere omission to insist on the issue as to jurisdiction being first disposed of can be construed as amounting to a waiver or creating any estoppel. This is certainly not the same thing as pleading on the

merits without pleading to the jurisdiction of the Court and *King* v. *Secretary of State for India* [1], is a case of the latter kind. Whatever may be the rule in respect of foreign judgments (as to which see *Ramaiyar* v. *Krishna Pattar* [2], we are not aware that so far as Municipal Courts are concerned it has ever been held that by pleading on the merits, as well as to the jurisdiction of the Court or by going to trial on *both* sets of issues the defendant waives his objection to the jurisdiction of the Court; and for this purpose the distinction between the two classes of cases suggested by the learned judge seems to us immaterial. But even in respect of cases where no objection to the jurisdiction of the Court has been taken at the outset and the conduct of the defendant in proceeding with the suit is relied on as precluding him from raising the objection at a later stage, we doubt if the distinction above referred to, has any place. The facts on which the jurisdiction of the court rests may be taken to be as much within the knowledge of the defendant as of the plaintiff. But in any case the defendant if he wishes to avail himself of an objection to the jurisdiction may well ask for particulars as to the jurisdictional facts without prejudice to his objection.

Radha Shyam Basak *v.* **Secretary of State for India,** I. L. R. 44 Cal. 16.

On the question of notice under the Railways Act it is difficult to see how any other view than that adopted in this case can be taken consistently with the language of S. 77 of the Act as well as the definition of "Railway Administration" in S. 3. We are glad that the learned judges have taken the opportunity to point out that the judgment in *Nadiar Chand Saha* v. *Wood* [3] is somewhat too broadly expressed and that the very cases there relied on recognize that the notice required by the Act, may be duly served even without compliance with S. 140.

On the question of Limitation however, we cannot help observing that the Judgment of Chatterjee J., is somewhat too broadly put. The decision may well be sustained on the ground that in applying Art. 31 it was for the defendant company (which pleaded the bar of limitation) to show when the goods ought to have been delivered and in the absence of any evidence on that point

1. (1908) I.L.R. 35 C. 394. 2. (1915) I. L. R. 39 Mad. 733.
3. (1907) I. L. R. 35 C. 194.

the suit cannot be held to be barred. This is the view taken by Beachcroft, J.; but Mr. Justice Chatterjee goes further and suggests that the case being one of breach of contract, Art. 115 and not Art. 31, is the proper article. The learned Judge also thinks that Art. 31 can apply only to a suit by the consignee and not to one by the consignor. On these two points his Lordship's opinion seems to us open to question. As to the first, he overlooks the history and effect of the amendment introduced by Act X of 1899. (see *Jaldu-Venkata Subba Rao* v. *The Asiatic Steam Navigation Company of Calcutta.* [1]). As to the second, there is nothing in the language of the article to warrant the restriction. Whether the consignor or the consignee is the proper person to sue is a matter of substantive law and the language of the article is quite general and as a matter of policy there is nothing to justify a differentiation between a suit by a consignor and one by a consignee.

Ibrahim Bhura v. Isa Rasul, I. L. R. 41 B. 5.

We have little to say against the conclusion in this case, but there are one or two statements in the course of the judgment which seem to us too broadly put. For instance, referring to a registered deed by the husband in favour of his wife transferring certain properties and to the fact that during his life-time the husband never sought to revoke it or have it set aside, Beaman, J. observes, "it is idle to say that it was open to the parties to show that the document was hollow and sham and that the vendor or donor never intended that it should be acted upon. It has all its legal effect from the moment of execution and there can therefore be no question of any intention to act upon or not to act upon it later." If this means that a document originally operative cannot by a subsequent change of intention on the part of the transferor become inoperative we have no reason to quarrel with it. But if it is meant to lay down that once there is a registered document, a plea that it was sham or not meant to be acted upon is inadmissible, we are unable to accept it as correct.

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1. (1915) I. L. R. 39 Mad. 1.

NOTES OF IDIAN CASES.

Ganesh Krishna *v.* **Damoo:** I. L. R. 41. B. 64.

We have nothing to say against the view that no finality (as in the case of an order under S. 283 of the Code of 1882) attaches to orders passed under S. 287 in respect of the rights of other persons in or to property ordered to be sold. But when the learned Judges go on to say that in any view the order in question before them 'cannot be properly referred to S. 283,' we find it difficult to follow their reasoning. The order directed that 'the attachment should proceed free from the lien or mortgage claim;' and the Court seems to think that S. 282 can only cover an order *recognising* a mortgage or lien and not one *refusing* to recognise it. We see no basis in principle for this distinction. The language of S. 283 enacting the rule of finality refers generally to the party against whom an order under S. 281 is passed.' But the learned Judges following the decision in *Durga Prasad* v. *Mansaram* [1], hold that S. 281 does not provide for an order declaring the mortgage invalid. This seems to us immaterial. It is the fact of the disallowance of the mortgagee's claim and not the declaration of the invalidity of his mortgage that necessitates the suit under S. 283. In the new code R. 63 of O. 21 omits even the reference to the number of the rule and provides for a suit by any party against whom an order is made in connection with a claim or objection. As regards other cases on the point, we cannot say that the decision in *Nemagauda* v. *Paresha* [2], is capable of being distinguished in the manner attempted, *i. e.*, that the present point was assumed and not decided. Not merely was the point clearly involved in the case but the learned Judges expressly deal with it when they refer to and follow the earlier decision in *Yashwant* v. *Vithoba* [3]. The last cited case is clearly in point but it is not referred to in the decision under notice.

Moti Raiji *v.* **Laldas Jebhia:** I. L. R. 41. B. 93.

It is a somewhat curious, if not inaccurate, way of putting the thing to say, as Justice Beaman does, that in the two instances specified, *viz.*, by acceleration and by alienation for legal necessity,

1. (1904) 1 A. L. J. 531. 2. (1897) I. L. R. 22 B. 640.
3. (1887) I. L. R. 12 B. 231.

a Hindu widow "can *convey* a greater interest than that which she herself has."

But we welcome the lucid and vigorous way in which the learned Judge has stated the distinction between acceleration and alienation as applied to a Hindu widow's estate. The confusion between these two distinct processes has contributed, not a little, to the conflict and uncertainty of Indian case law, on the subject of widow's dispositions. It is in any view anomalous to apply the theory of a presumption of validity arising from the reversioner's consent to cases in which the disposition is in favour of the reversioner himself or his consent is *purchased.* But the decisions of the Judicial Committee in *Bijoy Gopal Mukerji* v. *Girindra Nath Mukerji* [1] and *Bajrangi Singh* v. *Manokarnika Baksh Singh* [2] seems to countenance such an application. It is even more difficult to justify, on the theory of *surrender*, a transaction by which the widow and the immediate reversioner may practically divide the estate between themselves. Not even the principle of *stare decisis* will justify the perpetuation of the view that supports such transactions. We may invite attention here to some interesting observations on these points in the considered judgments of Abdur Rahim and Srinivasa Iyangar, JJ., in *Molugu Kotayya* v. *Mudigonda Chandramowli Sastri* [3] where the learned Judges endeavour to put on a logical basis the different rules pertaining to this topic.

One other point touched on by Beaman, J., deserves to be noticed here, that is, as to the effect of an adoption by a widow on a surrender previously made by her. In the case of an alienation, the law is now fairly well settled as to the rights of the after-adopted son, the decision in *Sreeramulu* v. *Kristamma* [4], having been recently overruled by the Full Bench. But the case of a surrender (or acceleration) accompanied by adoption later on has not, as the learned Judge says "formed the subject of Judicial decision." In the light, however, of certain established principles, we think that some of the learned Judge's observations in this connection are open to question. We cannot agree with him for instance that for the present purpose, posthumous sons and after adopted sons should be regarded as standing on the same footing. In the case of the

1. (1914) I. L. R. 41 C. 793
2. (1907) I. L. R. 30 A. 1.
3. (1916) 31 M. L. J. 406
4. (1903) I. L. R. 26 M. 143.

former, neither his existence nor his rights depend on any voluntary act of the widow; the widow has at no time any rights in the property which from the moment of gestation or from the date of the father's death (as the case may be) vests in the child in the womb as a 'legal person' and a surrender by her during pregnancy cannot therefore affect the title of the child, *if* it should be born a male. Not so in the case of a son to be adopted by the widow; she may or may not adopt as she likes and till she chooses to adopt, the property remains vested in her as in any other case and is therefore capable of being surrendered by her. Cf. *Bamundas* v. *Mussamat Tarinee* [1]. We do not know why the learned Judge doubts whether the recognition of rights in the child in the womb 'can be justified in the Hindu Law proper. There can be no doubt that for many other purposes, the Dharma Sastras regard the embryo as a being in existence. The real difficulty, to our mind, is whether by a surrender, the widow does not put an end to her power to adopt. This may to some extent be the logical result of treating surrender as tantamount to a civil death;' but the law on that point is not altogether consistent with the theory that she ceases to exist as a 'juridical' personality, for she may acquire property still and in fact even retain her stridhanam property. But the same result may follow from the principle of *Bhoobun Moyee's* case, the circumstances assumed not bringing the case within the rule in *Virada Pratapa* v. *Brojo Kishoro* [2] or *Bachoo* v. *Mankoerbai* [3].

Durga Das Khan v. **Ishan Chandra Dey** : I. L. R. 44. Cal. 145

We find it hard to follow some portions of the judgment in this case. A Hindu mother purported to bequeath to her daughter certain property which she had taken as heir to her son. The will provided for payment of certain allowances by the daughter to the family of a surviving son of the testatrix and it also directed that if male children should be born to that son they should, on attaining 25 years succeed to the whole estate. A son was so born, but only 'after the death of the testatrix,' so that the devise in his favour failed under the Tagore case. The daughter had entered into possession under the will and paid the allowances thereby directed, to her brother's family. On the daughter's death, the

1. (1858) 7 M. I. A. 169. 2. (1876) I. L. R. 1 M. 69 (P. C.)
3. (1907) I. L. R. 31 B. 373 (P.C.)

after-born grandson claimed the property not under the will but as reversioner. In so far as the grandson may assert a title under the will we agree with the learned Judges that the possession of the daughter taken under the will cannot be treated as adverse to him, merely because the testatrix had no interest to dispose of by will. But when a person puts forward a title *dehors* the will, the fact that himself and the person entitled to the prior estate under the will "accepted the position conferred on them by the will" does not seem to us relevant. The learned judges hold that the daughter and those claiming under her were estopped from disputing the title of the grandson and that it made no difference for this purpose, that the grandson chose to claim not under the will, but as reversionary heir. We are, with all respect, unable to agree with them. The estoppel laid down in *Board* v. *Board* [1], and other cases of that class extends only to the question of the title of other persons *under the will.* And even in respect of that, there seems to exist a further limitation *viz.*, that it excludes only any objection based on the 'title of the testator' to dispose of the property and does not cover any plea as to the legal invalidity of the devise in favour of the remainderman as, for instance, under the rule against perpetuities. For, in the latter case, the question is not whether with respect to the testator's title the same person can say that the will is valid for his benefit but invalid in other respects but whether (assuming that the testator had title to the property) it can be said that a certain part of the will is such as the law can give effect to and the other part is not. (Cf. *In re Anderson; Pegler* v. *Gillatt* [2], Halsbury's Laws of England. Vol. 13. 'Estoppel' (S. 530). No rule of estoppel would therefore exclude the plea of the invalidity of the devise under the rule in the Tagore case.

It may be said however that the daughter having entered into possession under the will, must be taken to have prescribed only for such estate as the will purported to confer upon her and where that was only a limited estate, the heir at law could come in on the termination of that estate; but this is a different matter.

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1. (1873) L. R. 9 Q. B. 48.
2. (1905) L. R. 2 Ch. 70.

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Khawani Singh v. Chet Ram : I. L. R. 39 A. 1.

The subject of Hindu widows' alienation in favour of or with the consent of the next presumptive reversioner is in the most unsettled condition. The confusion has been largely the result of apparently inconsistent judgments of the Privy Council and the more or less unsuccessful attempts made by the various High Courts to interpret and reconcile them. Judging from the trend of decisions all the High Courts seem to be, with an occasional jarring note, tending towards the following conclusions:

(i) The consent of the next presumptive reversioner is evidence of necessity and may operate to estop the party consenting and his sons and possibly his heirs but stands on no higher footing and cannot absolutely validate the alienation.

(ii) The consent of the whole body of reversioners may have this effect.

(iii) If the widow alienates her entire interest in favour of the next reversioner, even though such surrender is for consideration, will bind the actual reversioner.

(iv) The entire interest referred to is not merely her entire interest in any particular item of property but her interest in the entire property of her husband.

(v) Alienation of the entire property with the consent of the presumptive reversioner may be upheld as being in effect a surrender and a conveyance.

How far any of the difficulties presented by these conclusions can be got over by conveyancing devices such as making an alienation appear as a surrender or a surrender appear as an alienation is a question still unsettled. It was once thought that the effect of *Behari Lal* v. *Madho Lal Ahir Gayawal* [1], was that the widow should not reserve to herself any benefit directly or indirectly from the husband's estate. This view no longer holds the field though it can hardly be said it has been driven out of the field.

Varadaji Kasturji v. Chandrappa : I. L. R. 41. B. 40.

On the question of the distinction between a general power of attorney and a special power, we cannot help feeling with the learned Judges who decided this case that the authorities cited in *Venkataramana Iyer* v. *Narasinga Row*, [2] 'justify rather the conclusion that the document then before the court, was a specia-

1. (1891) I L. R. 19 C. 236.
2. (1914) I. L. R. 38 M. 134.

power of attorney.' The distinction is, if we may respectfully say so, correctly stated by the learned Judges in this case, when they point out that it is not 'between one act and several acts but between an agency for a particular piece of business and an agency for all business or all business of a certain class.' As pointed out in the Madras case, the distinction was rendered immaterial by the new code, so far as proceedings in courts are concerned and we cannot guess why the Bombay High Court thought it necessary to amend O. 3, R. 2 of the Code, so as to nullify the change which the legislature thought fit to make. It seems to us needlessly hard to require that if a person wishes to get a *particular* litigation of his, conducted by another he should be prepared to run the risk of appointing the latter, a 'general' agent. The Bombay amendment also restores the old condition (even in clause (*a*) of the rule) as to the non-residence of the principal within the jurisdiction.

Ananda Mohan Shaha *v.* **Anandra Chandra Naha**: I. L. R. 44 C. 154.

This rather seems to us a 'benevolent judgment.' The mortgage-bond sued on was found altered, in respect of the provision for interest, from 'one rupee per mensem' into 'one rupee *per cent.* per mensem' and the Courts below found that the alteration had been made after registration, without the knowledge of the mortgagor, but not with any fraudulent intent, the alteration only giving effect to the rate originally agreed upon between the parties. It was pleaded that the alteration made the document unenforceable but the learned Judges state it as the law that 'an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument.' We are by no means sure that this is so. As will appear from some of the cases referred to in *Suffel* v. *The Bank of England* [1], the principle of the rule about the effect of material alterations is not merely the prevention of fraud but the preservation of the identity of the 'instrument.' This has to be clearly distinguished from the question of the identity of the 'contract.' It certainly cannot be said that the alteration in the present case was not material nor can the fact that the change only gave effect to the original intention of the parties make it any the less an alteration so far as the instrument is concerned. *Adsetts* v. *Hives* [2], which perhaps relaxed the rule to the utmost extent, is largely

1. (1882) L. R. 9 Q. B. D. 555 2. (1863) 33 Beav. 52.

based on the particular circumstances, including the fact that blanks were left in the instrument which, it must have been the intention of the parties, should be filled up later on. We are aware that the rule as stated in the case under notice is supported by a passage in *Gour Chandra Das* v. *Prasanna Kumar* [1], but the rule was assumed there while the cases referred to, do not really support it. *Dodge* v. *Pringle* [2], has no bearing on the present question. *Cariss* v. *Tattersall* [3], proceeds on the footing that the alteration was made with the assent of both parties. And *In re Howgate and Osborn's Contract* [4], can scarcely be regarded as laying down any general principle. The name of one of the parties had been misstated and since corrected. Kekewich, J., proceeded on the ground that it was not really a case of material alteration. He said, that in one sense it was an alteration, in another sense, not. And, as evidence could be given that the name as originally entered was a misdescription, the alteration, he held, could not affect the interest created by the very execution of the instrument. But as a general rule, the fact that an instrument does not correctly express the intention of the parties may be a ground for 'rectification' in the manner provided by law but it does not entitle a party to take the law into his own hands.

The other point raised in the case, but left undecided, is even more difficult. It rests on the distinction between conveyancing documents and documents embodying contracts or other covenants. It may be taken as well settled that a subsequent alteration of a deed of conveyance will not affect the title originally vested by the deed as executed; but even in such cases the authorities seem to suggest that the covenants in the deed may become unenforceable. How does this distinction bear on a 'mortgage' document? It has been said that 'the execution of the instrument creates a charge upon the property which the subsequent alteration of it does not destroy', and that a suit to enforce that charge may be maintained in spite of the alteration. *Ramasami Kone* v. *Bhavani Ayyar* [5]. And this view seems to have the approval of the majority of the Full Bench in *Kristacharlu* v. *Karibasayya* [6], of Subramanya Ayyar, J., in *Subramanya Aiyan* v. *Krishna Aiyan* [7] and probably of Banerjee, J., in *Mangal Sen* v. *Shankar Sahai* [8]. We have come across no English case dealing with this point directly.

1. (1906) I. L. R. 33 C. at p. 815.
2. (1860) 29 L. J. Ex. 115.
3. (1841) 10 L. J. C. P. 187.
4. L. R. (1902) 1 Ch. 451.
5. (1866) 3 M. H. C. R. 247.
6. (1885) I. L. R. 9 M. 399.
7. (1899) I.L.R. 23 M. 137.
8. (1903) I. L. R. 25 A. 580.

but with all respect to the learned Judges concerned, we cannot help feeling that the view above stated is an extension of the distinction referred to and is not within the spirit of the cases in which the distinction is recognised in England. Can it really be said that the enforcement of a mortgage is not the enforcement of the obligation or covenant in the deed of mortgage, but is something independent of it and incident merely to the *real interest* created by the mortgage document. The definition of a mortgage as the 'transfer of an interest' should not blind us to the substance of the transaction. A suit for sale is not, like a suit in ejectment, based on *title*, of which the document is but *evidence*; it is really an action to enforce the contract contained in the document, the law allowing two remedies for the same, one personal and the other, against the security. Even according to the definitions in the Transfer of Property Act, the right of sale is in the case of a simple mortgage founded on the agreement of parties, express or implied. The fact that the remedies are enacted by way of statutory provisions cannot dissociate them from their contractual basis. For instance, in the case of sales, the warranties, etc. are enacted in statutory form. The English cases clearly contemplate that the warranties may become unenforceable as a result of the alteration of the deed of conveyance; is the result to be different because of their statutory shape, under the Conveyancing Act in England or under the Transfer of Property in this country? The real test, as pointed out by Mookerjee, J., in *Gourchandra* v. *Prasanna Kumar* [1] is whether the transaction or part thereof in question is executory or executed and there is much to be said in favour of the view that a 'mortgage' remains executory until its enforcement,' as it is in essence but a security for the debt. The insufficiency of Lord Abinger's observations in *Davidson* v. *Cooper* [2] as a basis for the view taken in *Ramasami Kon's case* is forcibly pointed out by Aikman, J. in his dissenting judgment in *Mangal Sen* v. *Shankar Sahai* [3]. The judgment of Stanley, C. J., in that case does not seem to go the full length of the Madras view and is based to a considerable extent on the circumstance that there the mortgagee was not *suing to enforce* his right under the document which had been altered but had been impleaded as a defendant by the puisne mortgagee (plaintiff) who admitted the existence of the prior mortgage and offered to redeem it.

1. (1906) I.L.R. 33 C 819. 2. (1843) 11 M. and W. 778.
3. (1903) I. L. R. 25 A. 580.

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Bhagvan Dayal *v.* Paran Sukh Das : I. L. R. 39 A. 8.

We have the direct authority of the Privy Council that the result of re-opening a compromise decree on the ground of fraud or want of sanction for the compromise is to restore the suit, *Khajooroonissa* v. *Rowshan Jehan* [1]. On principle, it is difficult to see how in the comparatively more innocent case of an invalid or irregular appointment of a guardian it could be otherwise. S. 151 has been declared by the Privy Council to be available for the correction of the error of the court in dismissing a suit for default in ignorance of the death of the plaintiff, *Debi Baksh Singh* v. *Habib Shah* [2]; the present would seem a case *ejusdem generis* with the cases covered by the Privy Council judgment. In these cases, there might occasionally be trouble by the compromise or the decree, remaining intact against or in favour of the other parties to the suit or compromise.

Gajraj Mati Tuvarin *v.* Swami Nath Rai : I. L. R. 39 A. 13.

The conclusion in this case may be in conformity with the trend of decisions in the Allahabad High Court which has taken a somewhat narrower view in this matter than the other High Courts but is inconsistent with the theory of appeal enunciated by Sir Bashyam Aiyangar, J. in *Krishnamachariar* v. *Mangammal* [3]. While there is no denying there is considerable force in this argument *ab inconvenienti* put forward by Mr. Justice Sunder Lal, this case illustrates in a fairly strong manner the anomaly involved in such view. This was a mortgage suit. The Appellate Court modified the decree of the lower Court in the absence of one of the mortgagors, no doubt a wrong procedure but there it was. Then, that person put in an application to the court of the 1st instance to set aside the *ex parte* decree against her. According to the ruling of the Privy Council in *Ashfaq Hussain* v. *Gauri Sahai* [4], the right procedure if the application succeeded was to set aside the entire decree but it should be in the highest degree anomalous that the First Court should set aside the appellate decree and it should be equally anomalous under the same ruling that the decree of the First Court passed after setting aside the *ex parte* decree should

1. (1876) I. L. R. 2 C. 184.
2. (1913) I. L. R. 35 A. 331.
3. (1902) I. L R. 26 M. 91.
4. (1911) I. L. R. 33 A. 264.

supplement the decree of the Appellate Court and afford a fresh starting point for limitation against the parties to the appellate decree. Nor are we certain that the exceptions recognised *viz.*, cases of interference under O. 41, R. 4 and O. 41, R. 33 exhaust possible cases of conflict. Again, a person may unnecessarily be made a party to the appeal; or there may be no appeal at all as regards portions disallowed and on principle, such accidents should not affect the conclusion. We think on the whole, the sound rule is that laid down by Sir Bhashyam Aiyangar and since recognised in a way by the legislature when it altered the language of S. 48, C. P. C. not to speak of its conformity with the theory involved in the Limitation Act.

Bank of Multan *v.* **Kampta Prasad**: I. L. R. 39 A. 33.

It is settled that a shifting balance is not an essential requisite, but there should be independent demands, not merely indebtedness and attempts to liquidate the same with even a possible over-payment on occasion.

Chedi Lal *v.* **Saadatunnissa**: I. L. R. 39 A. 36.

The object of O. 34, R. 14 is to prevent the mortgagee from committing a fraud on the mortgagor by keeping in reserve his outstanding mortgage. Obviously this does not require that the rule should apply when the mortgage security is barred, released or validly relinquished. The language may be capable of an interpretation which might take in all these cases but we do not think it is a reasonable construction.

Raghunath Chanbe *v.* **Narasingh Tewari**: I. L. R. 39 A. 61.

In *Hanuman Kamat* v. *Hanuman Mandar* [1] The Privy Council no doubt say that the alienation by a member of a joint Hindu family is only voidable and not void and this view is not necessarily inconsistent with the decision in *Lachman Prasad* v. *Sarnam Singh* [2], but apart from some of the special equities referred to by Mr. Justice Sundar Lal, which might justify the Court in refusing to award mesne profits, is not the position similar to that of an alienation by the widow which is according to *Bijaygopal Mukherji* v. *Krishna Mahishi Debi* [3], not void but voidable at the election of the reversioner. Though the election might be expressed only in the suit, such an election retro-acts

1. (1891) I. L. R. 19 C. 123 2. (1917) 33 M. L. J. 39 (P. C.)
3. (1917) I. L. R. 34 C. 329

and makes the alienation unlawful from the beginning and entitles the party to mesne profits. There may be cases of alienation by the widow in which special equities might disentitle the reversioner from claiming mesne profits.

The argument based on the non-accountability of the father for mesne profits is not convincing for that non-accountability is personal and arises partly from the presumed application of the income for family purposes in the manner that the father or manager in his judgment such as he possesses by nature and honestly exercises, deems fit and partly also from the presumed acquiescence of the junior member and cannot in the nature of things pass to the purchaser.

Kundan Singh *v.* **Surja Kunwar** : I. L. R. 39 A. 67.

There can be no pretence after partition of a member of a Hindu family representing his co-parceners and to hold the real owners bound on any principle of *executorship de son tort* in the absence of any circumstances such as for instance existed in *Ramaswami Chettiar* v. *Oppillamani Chetti* [1] would be a serious extension of the law and might involve great hardship.

Emperor *v.* **Abdul Aziz** : I. L. R. 39 A. 141.

It is very remarkable as Mr. Justice Walsh rightly points out, that the beneficent provisions of the Reformatory Schools Act should be so little availed of, in fact so little known. When all over the world vigorous attempts are being made to prevent the youthful criminal from deteriorating into the professional by contact with the latter it is very much to be regretted that even this small experiment should not be more frequently tried. The same remarks apply more or less to S. 8 of the Act but there the question is more one of accommodation in the Reformatories.

Hummi *v.* **Aziz-ud-din** : I. L. R. 39 A. 143.

In so far as this case holds that the only remedy available to a person against whom an *ex parte* decree is made, is to apply to have the decree set aside it is opposed to the decision of the Full Bench of the Madras High Court in *Krishnayer* v. *Kuppaniengar* [2]. It is quite another question, however, whether when a party applies to set aside the *ex parte* decree under O. 9, R. 13 and his application is rejected his only further remedy is by way

1. (1909) I. L. R. 33 M. 6. 2. (1906) I. L. R. 30 M. 54.

of appeal under O. 43, r. 1. and whether when the appeal also is dismissed, he has any right to urge his objections to the *ex parte* decree in any second appeal he might file. The question was raised but not considered in *Caussanel* v. *Soures* [1], and *Perumbra Nair* v. *Subramania Patter* [2], *Laxmidas Vittaldas* v. *Ebrahim* [3], decide that the order of the first court rejecting the application can be objected to in the appeal from the *ex parte* decree. The decisions prior to the new Code relating to orders of remand to some extent, support the view of the Bombay Court.

Jhabba Lal *v.* Shibcharan Das : I. L. R. 39 A. 152.

In circumstances somewhat similar a Bench of the Madras High Court, after an exhaustive consideration of the case law on the subject has come to an opposite conclusion and held that an appeal lay at the instance of the creditor, *Kumarappa Chettiar* v. *Murugappa Chettiar* [4] see also *Thiruvenkatachary* v. *Thangayiammal* [5]. The case under review while stating fully the arguments against allowing the creditor to intervene, seems to ignore the important circumstance that insolvency proceedings are conducted for the benefit of the creditors and they are given large powers of interference. S. 22 of the Provincial Insolvency Act can ordinarily have reference only to creditors and there is no special reason why S. 46 should have a more limited application. A creditor's interest cannot be put on the same footing as that of the insolvent. If there is excessive or officious interference, the remedy is in the hands of the Court. If it comes to that, the court may resort to its inherent power to prevent abuse of its process though to justify such a resort, special circumstances must exist, *Chhtrapat Singh Duga* v. *Kharaj Singh* [6]. We should agree nevertheless with the observations of Mr. Justice Walsh that the proper procedure for the creditor is to move the Official Receiver. However, if the Official Receiver is not inclined to comply with the creditor's request, to compel him to go to the court is practically to deny him his remedy, the time allowed for appeal being as it is.

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1. (1899) I. L. R. 23 M. 260.
2. (1899) I. L. R. 23 M. 445.
3. (1878) I. L. R. 2 B. 644.
4. (1916) 36 I. C. 771.
5. (1915) I. L R. 39 M. 479.
6. (1916) 32 M. L. J. 1 P. C.)

NOTES OF INDIAN CASES.

Dulla *v.* Shib Lal : I. L. R. 39 A. 47.

The question in this case, *viz.*, whether the legal representative of a party is not bound to raise the objection that the property attached is his own in execution or could bring a separate suit in respect of it was decided by the Madras High Court in *Kuriyali* v. *Mayan* [1], and that decision was approved by the Privy Council in *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* [2].

Sushil Chandar Das *v* Gauri Shankar : I. L. R. 39 A. 81.

An agent's commission could in no sense be called wages and therefore their Lordships held that the article relating to wages did not apply and that article 115 applied. Though that article speaks only of compensation, there could not be the remotest doubt that it would apply to cases like this, especially after the judgment of the Privy Council that art. 116 worded similarly would cover cases of rent. *Tricomdas* v. *Sri Sri Gopinathaji Thakur* [3].

Abdul Majid *v.* Bedyadhar Saran Das : I. L. R. 39 A. 101.

This case follows the Full Bench decision of the Madras High Court in *Kollipara Sitapathy* v. *Kankipati Subbaya* [4]. These cases, we think, have overlooked the language of S. 32 of the Provincial Small Cause Courts Act. Under that section the finality attached by S. 26 to the decision of the small cause courts attaches in the case of courts invested with small cause jurisdiction only "so far as regards the exercise of that jurisdiction." The section does not attach finality to the decision of those courts in any class of suits but only so far as they exercise the small cause jurisdiction. In the absence of such a provision, an appeal would lie to the appellate court under S. 96, Civil Procedure Code. It may be, according to well recognised principle, the appellate court has jurisdiction only to correct the usurpation of jurisdiction by the court of the first instance. *Abdul Rahiman Sahib* v. *Ganapathi Bhatta* [5]; *Harrish Chunder Chowdhury* v. *Kali Sundari Debi* [6]; *National Telephone Company* v. *Postmaster General* [7].

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1. (1883) I. L R. 7 M. 255.
2. (1892) I. L. R. 19 C. 683.
3. (1916) 32 M. L. J. 357.
4. (1908) I. L. R 33 M. 323.
5. (1900) I. L. R. 23 M. 517.
6. (1882) I. L. R. 9 C. 482 (P. C.)
7. (1913) A. C. 546.

But S. 16, it is said, does not take away the jurisdiction of the court on its regular side. If that is right, to say that the appellate court has no jurisdiction at all to hear the appeal seems to be wholly wrong. In this view, the Appellate Court may have power to see if the irregularity is such as to require its interference on that ground. On principle it is difficult to see, if the trial on the regular side is only an irregularity, why the Appellate Court should not have power to interfere on the merits. However that may be, it would seem to be wrong to say that the Appellate Court had no jurisdiction to entertain the appeal.

Ram Dei *v.* **Munna Lal**: I. L. R. 39 A. 109. **Uttam Singh** *v.* **Hukam Singh**: I. L. R. 39 A. 112.

These cases raise an interesting point on the construction of Ss. 68 and 69 of the Indian Evidence Act. Now S. 59 of the Transfer of Property Act requires a mortgage to be signed by the mortgagor and attested by at least two witnesses. On whom is the burden of proving that the attesting witnesses did as a matter of fact attest the execution? *Prima facie* it should be on the mortgagee who has to make out the validity of the document which he seeks to enforce. (See 6 L.W. 148). But S. 68 of the Evidence Act says "If a document is required by law to be attested, it shall not be used until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence." If this section had stood alone, it could not be said that the attesting witness need speak only to execution of the document by the executant and no further evidence as to attestation by the other witness is necessary. But reading this section along with the next, it is said that it is clear that the evidence of one witness having attested is sufficient. For that section says if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. The point is by no means clear. It may be said that this view does not take sufficient note of the distinction between mode of proof and proof of circumstances necessary to establish the validity of the transaction. But reading the two sections together, the intention of the

legislature seems to be as stated by the Allahabad High Court. The rule laid down as regards attestation by the Privy Council is so full of pitfalls to the unwary that every interpretation that makes for smoothening the difficulties of the creditor should be welcome.

Nannu Lal *v.* Bhagawan Das : I. L. R. 39 A. 114.

Though it may be that once a sale is set aside under O. 21, Rr. 89, 90 or 91, the purchaser may at his option either sue or pursue his remedy in execution (see *Parvathi Ammal* v. *Govindasami* [1]) (there being no words in the rule restricting him to the latter course), it must be admitted that there is no basis for the statutory right of suit on discovery of the absence of saleable interest such as was conferred by the Code of 1882. But whether a qualified warranty of title should not be implied from the provisions of the Code so as to justify an action for failure of consideration or for money had to the use is another question. The Privy Council in *Dorab Ally Khan* v. *Abdool Aziz* [2] had not the present Code before it. Under the Code of 1859, what the court purported to sell was only the " right, title and interest of the judgment debtor " a memorable phrase in another connection. What is sold under this Code as well the Code of 1882 is the property, title to which is investigated by the Court. The Court, of course, is not answerable for any " error, mis-statement or omission in the sale proclamation. " (App. E. Form 29) but that does not affect the question. Nor is cl. 5 of form 56 Rules of Practice necessarily inconsistent with such qualified warranty. It apparently refers only to misdescription of property and not to misdescription of title. Why should not total failure of consideration *ex aequo et bono* give rise to a cause of action? See *Ram Kumar Shah* v. *Ram Gour Shah* [3]. This right if recognised may not cover as wide a ground as the right conferred by S. 315 of the old Code of Civil Procedure but would undoubtedly be a substantial equivalent. Partial failure of consideration would not be a ground for relief *inter alia* because the qualified warranty we can infer from the sections cannot go beyond O. 21, R. 91.

1. (1915) I. L. R. 39 M. 802. 2. (1878) I. L. R. 3 C. 806. (P. C.)
3. (1909) I. L. R. 37 C. 67.

Ramajas *v.* Mahadev Prasad: I. L. R. 39 A. 147.

An order granting sanction is regarded by the Madras High Court as a judgment against which an appeal lies under the Letters Patent, *Chakrapani Aiyangar* v. *King Emperor* [1]. Their Lordships hold that it is not a sentence or order made in a criminal trial. The Calcutta and the Allahabad High Courts have taken a somewhat narrower view of the word "judgment" than the Madras High Court. S. 115 of the Civil Procedure Code had a somewhat similar history. The words "case" and "decided" have received varying interpretations. The Privy Council has however declared itself in favour of the wider view, *Balakrishna Udayar* v. *Vasudeva Iyer* [2]. Any argument based on S. 195 of the Criminal Procedure Code was foredoomed to failure for in no sense a single judge of the High Court exercising jurisdiction is a court subordinate to any Bench of judges of the same Court exercising jurisdiction.

Sadu Ram *v.* Mahabir Prasad: I. L. R. 39 A. 171.

Though we could not agree with the construction put upon the word "aggrieved" in *Jhabba Lal* v. *Shibcharan Das* [3], nevertheless we think that the creditors of the insolvent are not persons aggrieved by the order of the court refusing to punish the insolvent. The interest of the creditor consists in seeing that the creditor performs his duty and does not extend to seeing him punished if he fails. Beyond operating as a deterrent for dishonestly inclined debtors, S. 43 cl. (2) does not help the creditor in securing the full and speedy realisation of the debtor's assets in which alone he is interested.

Pirdi Lal *v.* Maden Lal: I. L. R. 39 A. 191.

The answer to the arguments contained in this case is to be found in the Privy Council Judgment in *Hurrish Chunder Chowdhri* v. *Kali Sundari Debi* [4]. S. 588 as their Lordships point out has reference only to appeals from one court to another and not to appeals from one judge of a court to other judges of the same court.

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1. (1902) 12 M. L. J. 408. (F. B.)
2. (1917) 33 M. L. J. 69 (P. C.)
3. (1916) I. L. R. 39 A. 153.
4. (1882) I. L. R. 9 C. 482.

NOTES OF INDIAN CASES.

Moti Chand *v.* **Ikram Ullah Khan**: I. L. R. 39 A. 173 (P. C.)

The Agra Tenancy Act provides that when a proprietor parts with his proprietary rights otherwise than by gift or by exchange as between co-sharers he shall continue a tenant of the *sir* land and hat such interest of the ex-proprietary tenant shall not be transferable otherwise than by partition as between co-sharers jointly entitled thereto from the time of the origin of the right or by succession thereafter. The tenant however could surrender or gree to surrender the holding to his landlord. An attempt was made in this case to get round these provisions by arranging at the time of the sale; that after the sale, the vendors should execute a deed of relinquishment of their ex-proprietary rights, in default pay damages. Their Lordships emphatically point out that ll such devices, arrangements and agreements are in contravention of the policy of the Act and are contrary to law, and are illegal nd void and cannot be enforced by the vendee in any Civil Court r Court of Revenue.

Sukh Lal *v.* **Bishambhar**: I. L. R. 39 A. 196.

No attempt is made in this case to examine the nature of the *Mahabrahmin* right. It was not an office; and on the statement of facts it does not appear there was any obligation on the part of the clients to engage the services of the particular priest. Under these circumstances it is hard to see what the right that is transferble consists in. A sort of good will is all that remains and the question is whether the recognition of such a good will is not pposed to the principle of *Dwarkanath Misser* v. *Ram Pertab Misser* [1]. We should think it is. *Gourmani* v. *Chairman of Panihati Municipality* [2], *Saripaka Chinna Mahadeva Vazulu* v. *Muthuru Suryaprakasam* [3].

Sahu Ram Chandra *v.* **Bhup Singh**: 33 M. L. J. 14.

This recent decision of the Privy Council requires more than passing notice. On the main issue raised in the case, *viz.*, as to

1. (1911) 13 C. L. J. 449. 2. (1910) 12 C. L. J. 75.
3. (1914) 26 M. L. J. 482.

the power of a father in a mitakshara family, to mortgage family property for a *present* debt, the judgment only affirms what was fairly well established by the preponderance of authority in India, though not without considerable diversity of judicial opinion. It may however be pointed out that in the later Indian decisions the question had been treated largely as one depending upon the precise effect of the observations of Lord Hobhouse in *Mussumat Nanomi Babuasin* v. *Modun Mohun and others* [1]. In *Chidambara Mudaliar* v. *Koothaperumal* [2] where Boddam and Bashyam Iyengar, JJ. sought to base their decision on logical principle, they regarded a mortgage, as primarily a debt rather than an alienation. But their Lordships now seem to emphasise the latter aspect; The other assumption made by the learned Judges in that case related to the existence of the liability of the sons, *even during the father's life-time*, to pay their father's debt. This again seems to be negatived by the judgment under notice and it is this part of their Lordships' pronouncement which seems to us likely to lead to fresh developments in Indian case-law. Before proceeding to deal with this point we may point out in passing that there is one observation in the course of their Lordships' judgment which is apt to be misleading, *viz.*, when they remark that "Any deed of gift, sale or mortgage granted by one co-parcener on his own account of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety stands free of it." The same principle is assumed in *Latchman Prasad* v. *Sarnam Singh* [3]. This is not the rule in Madras or Bombay where for a long time the Courts have recognised the power of a member to alienate his undivided share for consideration whether by way of sale or mortgage; this is in a way referred to by Stanley, C. J. in *Chandra Doe* v. *Mata Prasad* [4], and it has frequently been recognised by the Judicial Committee also. It surely could not have been their Lordships' intention to upset it by this kind of incidental observation.

In the case of the father their Lordships recognise that he has certain larger powers in dealing with the family property than an ordinary member; but they associate this with his character, as manager of the family and dissociate it totally from the doctrine of the son's liability to pay the debts of the father,

1. (1885) L. R. 13 I. A. 1.
2. (1904) I. L. R. 27 M. 326.
3. (1917) 33 M. L. J. 59.
4. (1909) I. L. R. 31 A. at p. 208.

with the result that they compare the disposing powers of the father to those of the head of a mutt or of the guardian of an infant. In another place they speak of an improper alienation by the father as a 'breach of trust.' Their Lordships refer to these only by way of analogy but we are not sure if the analogy may not be pressed too far. The doctrine as to the son's pious obligation and the admitted exception as to dispositions in respect of 'antecedent debts'—neither of which connects the 'liability' of the estate with any 'benefit' derived by it from the particular transaction—put the father's power on a peculiar footing of its own.

On the question of the son's liability to pay the father's debt their Lordships observe, "while the father, however, remains in life, the attempt to affect the son's and grandson's share in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they with their father jointly own, that attempt must fail." And again, 'the case founded merely upon pious obligation......fails, in the present instance by reason of the fact that Bhup Singh who contracted the debt is still alive.' This takes us back to the question raised in *Ramasawmi Nadan* v. *Ulaganatha Goundan* [1]. Their Lordships no doubt adhere to the 'exception' established in respect of dispositions by the father 'in consideration of an antecedent debt' and a long series of decisions have also recognised the right even of simple creditors of the father to proceed against the joint family estate in execution of decrees obtained against the father. But the precise status of the sons in relation to such proceedings does not appear to have ever been defined by their Lordships. Some decisions of the Judicial Committee clearly contemplate that the sons may be made parties defendants in the suits against the father but they do not show whether it is on the footing that there is a cause of action against them even during the father's life-time or merely to obviate a possible defence founded on the nature of the debt or the quantum of interest sought to be affected by the proceedings in the suit. Thus in *Nagendra Chunder* v. *Kamini Dasi* [2] the Privy Council refer to the reversioner being made a party defendant in a suit against a widow by a creditor of the estate. Cf. also

1. (1898) I. L. R. 22 M. 49. 2. (1867) 11 M. I. A. 241.

Brij Bhookun Lall v. *Mohadeo Dobey* [1], *Mohimachunder -Roy* v. *Ram Kishore Acharjee Chowdry* [2], *Srinath Das* v. *Hari Pada Mitter* [3], *Veerabhadra Aiyar* v. *Marudaga Nachiar* [4]. But it certainly cannot be suggested that the creditor has a cause of action against the reversioner during the widow's life-time. On the other hand the decision in *Ramasami Nadan's Case* [1], rests definitely on the footing that there is a substantive cause of action against the sons even during the life-time of the father. It may not be out of place here to point out that the actual difficulties felt in many of the Indian Cases dealing with this subject prior to 1908 have now been solved in a way by the provisions of the new Code *e.g.*, cases like *Natesaiyan* v. *Ponnuswami* [5], *Mallesam Naidu* v. *Jugala Panda* [6], and *Periasami Mudaliar* v. *Seetharama Chettiar* [7] have now been provided for by S. 53 of the Civil Procedure Code of 1908. But to obviate what the learned Judges felt would be a hardship in those cases in view of the processual law, as then interpreted in Madras *viz.*, that family property in the hands of the sons cannot after the father's death be reached by a creditor as " assets " of the father in the hands of a " legal representative" but only by a separate suit against the sons, the learned Judges felt constrained to adjust the substantive law to the ends of justice and expediency. The decision in *Ramasami Nadan's Case* [8] however, attempts to put the matter upon a strict logical ground, *viz.*, that the cause of action against the son is the same *both before and after* the death of the father. In so far as this question may be material in spite of the provisions of the new Code, the point will require reconsideration in the light of the observations of the Judicial Committee in the case under notice.

With reference to the expression "antecedent debt," the judgment no doubt endeavours to define the test of antecedency but we are by no means sure that the application of it may not be attended with considerable difficulty.

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1. (1872) 17 W. R. 422.
2. (1875) 23 W. R. 174.
3. (1899) 3. C. W. N, 637.
4. (1910) I. L. R. 34 M. 188.
5. (1892) I. L. R. 16 M. 99.
6. (1899) I. L. R. 23 M. 292.
7. (1903) I. L. R. 27 M. 248.
8. (1898) I L. R. 22 M. 49.

NOTES OF INDIAN CASES.

Har Chandi Lal *v.* **Sheoraj Singh** : I.L.R. 39 All. 178 (P.C.)

In this case, there was a mortgage by A in favour of plaintiff in respect of his lands and another mortgage by B who was the reversioner to A's estate in respect of his own lands. On the death of A, B and the widow of A gave a joint mortgage for the amounts of the two mortgages. On a suit being brought, however, it was held that the widow was not bound and a decree was passed for the whole amount only against the reversioner and his property. In execution the property of the latter was sold but realised just enough to pay his own mortgage. The mortgagee then brought a suit on the mortgage by A. The Courts below dismissed the suit on the ground that the mortgage by A had been performed within the meaning of S. 41 of the Contract Act, and could no longer be sued upon. Their Lordships hold that there having been no actual performance of the contract S. 41 was not a bar and also that the second mortgage could not operate as a release as the mortgage was found not to be binding on the widow. There are observations of their Lordships in this case that may be the subject of further discussion. The first is that the widow could have disposed of the property with the concurrence of the reversioner; another observation is that the attempt of B to make the property of A security for his own indebtedness could have succeeded if he survived the widow. Their Lordships' judgment also implies that though the attempt might have succeeded if B had survived, B's sons were not bound though they were the heirs of their father. Is it because they had no other property of their father (a suggestion for which there is no support in the judgment itself) or because "they do not claim the property as heirs of B but as heirs of A."? In the latter view, it must have a bearing on the construction of S. 43 of the Transfer of Property Act, and may also have a bearing on the doctrine of estoppel evolved out of *Bajranji Singh's case* [1].

Banga Chandra *v.* **Jagat Kishore** : (1917) I. L. R. 44 C. 186 (P. C.)

When an alienation by a Hindu widow is questioned by reversioners long afterwards it is not uncommon to find Courts struggling to help the alienee against the ordinary rule of *onus*,

1. (1907) I. L. R. 30 A. 1.

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if once they find reason to think that the original transaction was a *bona fide* one. The observations of the Lord Chancellor in this case seek to justify this frame of mind by a principle which in a measure modifies the general rule as to *onus*. It must be remembered however that even according to those observations the recitals in the original alienation as to the purpose thereof are declared admissible as against the reversioner only subject to certain safe-guards, *viz.*, that the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed the truth of the recitals. The case therefore cannot be regarded as upsetting the ordinary rule that the recitals are no proof of their truth, and evidence *aliunde* must be given to justify the alienation. The decision further draws a distinction between cases in which the truth of the recitals is itself the point at issue and those in which the conduct of a party acting *bona fide* on the representations of the person who may be presumed to make those recitals is the material fact. It is only in the latter case that the recitals are allowed to be taken into account as "evidence of the representation."

While affirming the usual rule that the mere fact of attestation does not involve the attestor in any knowledge of the contents of the document so as to imply consent or create an estoppel, their Lordships indicate the proper use to be made of that circumstance, *viz.*, for the purpose of cross-examination, to extract from the witness evidence to show that he was in fact aware of the contents.

Putta Kannayya Chetti *v.* Rudrabhatta Venkata Narasayya : I. L. R. 40 M. 1 (F. B.)

The question in this case was as to which Court appeal lay from the decree of a District Munsiff awarding more than Rs. 5,000 in a suit for accounts? Their Lordships hold that the appeal lay to the District Court and not to the High Court. The Madras High Court has consistently held (i) that the valuation put by the plaintiff in the class of cases in which he is permitted to put his own valuation, (the present being one such) could not be revised by the Court, (ii) that the Court, if the suit is properly laid, could pass a decree for an amount even above its pecuniary jurisdiction and the view taken in this case was but a necessary corollary of

these two positions. The Calcutta High Court does not grant either of those positions and holds that the forum of appeal is the High Court. The Allahabad High Court apparently grants these two positions but would seem to make a distinction that if an order is made for further payment of Court-fees and if the plaintiff pays the Court-fees, the valuation for purposes of jurisdiction would be altered. The Court in so doing, we think, overlooks the result of such a view which might be in some case to make the decree *ultra vires*. The practical difficulties of the contrary view are fairly illustrated by the case in *Bhupendra Kumar Chakravarthy* v. *Purna Chand Bose* [1]. In a suit for land and mesne profits because the future mesne profits on ascertainment came to an amount above the Court's pecuniary jurisdiction, the Calcutta High Court directed the return of that portion of the plaint which related to mesne profits to the proper Court. The logical position to take was to return the whole plaint, the result of which would have been to cancel the decree even as regards possession which may have been confirmed by the courts of appeal and second appeal. This startling conclusion was avoided by directing the return of only part of the plaint. But as pointed out by the order of reference partial return of the plaint does not seem to be contemplated by the Civil Procedure Code. The whole confusion arises in failing clearly to realise that "the subject-matter of the suit" is not its real value but its value as determined by certain artificial rules and there might be little or no correspondence between the two. In partition and redemption actions, for instance, a Munsiff might have to adjudicate on claims many times over his pecuniary jurisdiction.

Palaniappa Chetty *v.* **Palaniappa Chetty**: I. L. R. 40 M. 18 (F. B.)

The view taken by the majority in the case has certain practical considerations in its favour though the arguments for the alternative view cannot be said to be without force. In matters of procedure, it is more or less a question of balance of convenience. Appeals are ordinarily directed against the order appointing a receiver, the question whether this or that man is appointed being

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1. (1910) I. L. R. 43 C. 660.

generally a matter of little consequence. The Full Bench would seem to assume that an appeal would lie from the order nominating the receiver though in places it is referred to as a ministerial order.

Doraisami Padayachi v. Vaithilinga Padayachi: I. L. R. 40 M. 31 (F. B.)

We are afraid that their Lordships have taken an unnecessarily narrow view of S. 25 of the Contract Act. In the somewhat analogous case of current and open accounts, their Lordships of the Privy Council use language such as this: "there is therefore the clear admission that there were open and current accounts between the parties at the death of Motiram. The legal consequence would be that at the date either of them had a right as against the other to an account. It follows equally that, whoever on the account should be shown to be the debtor to the other, was bound to pay *his debt to the other* and it appears to their Lordships that the inevitable deduction from this admission is that the respondent acknowledged his liability to pay his debt to Motiram or his representative if the balance should be ascertained to be against him" *Maniram Seth* v. *Seth Rupchand* [1]. The language of S. 25 is not inconsistent with the use of the word debt as used by the Privy Council in the above passage. A promise to pay what on ascertainment, would become a *debt* in the legal sense is as much a promise to pay a debt as promise to pay an ascertained sum. Why should the word *debt* be taken to have been used in the *technical* sense of English law and not in the ordinary sense of that term?

In the matter of a vakil: I. L. R. 40 M. 69.

On the facts found it is clear that in this case, there was professional misconduct but even otherwise, we have travelled very far from the position that a professional man cannot be held accountable for his conduct as a party under the disciplinary jurisdiction of the High Court nor is it to be regretted that it is so for in the zealous maintenance of respectability of the individual members of the profession lies the claim of the profession to its position and respect no less than in the integrity and purity of the profession.

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1. (1909) I. L. R. 33 C. 1047.

NOTES OF INDIAN CASES

Jekisondas Harkisondas *v.* Ranchoddas Bhagvandas: I. L. R. 41 B. 137.

In this case Beaman, J. recurs to the point dealt with by him in *Khimji Vassonji* v. *Narsi Dhanji* 1 and pleads strongly against the extension of the doctrine of *Lumley* v. *Gye* 2 in India especially to marriage contracts; but here too, the question of law became immaterial in view of the conclusion which the learned Judge as well as his colleague came to on the facts. The question of the liability of the father who actually broke the contract was not discussed as there was no appeal by him. Incidentally a point of procedure is also touched upon in the judgment of Beaman, J. *viz.*, the propriety of suing in one and the same action, the person who breaks the contract and the other who is said to have induced the breach. He recognises that such a course has been permitted in more than one case in England but points out that in none of them was the question raised or discussed. The causes of action being distinct, the learned Judge thinks that if the objection had been taken in those cases, 'the plaintiff would surely have been put to his election, either to proceed against one defendant for breach of contract or against the other, on the case. Whatever might be the correct view under the English rule, it seems to us that in India, the mere fact of the causes of action being distinct is not decisive of the question. Even under the Procedure Code of 1882 the expression "in respect of the same matter" in S. 28 was held to authorise the inclusion in one suit of claims against several defendants, founded on separate causes of action, 'so long as they are in respect of the same matter' (see *Aiyathurai Ravuthan* v. *Meera Ravuthan* 3, and the cases there cited.) The new code has, if anything, enlarged the scope of the rule, by using the expression 'in respect or arising out of the same act or transaction or acts or series of transactions' as to which Cozens. Hardy, L. J. (as he then was) in *Bullock* v. *London General Omnibus Co* 4, observed that the result of inserting these words in O. 16, R. 1 R. S. C. was to make the rule comprehend not merely the 'joinder of parties' but the 'joinder of causes of action' as well. The absence of these words in R. 4 of that order and

1. (1914) I. L. R. 39 B. 682.
2. (1853) 2 E. and B. 217.
3. (1908) 18 M. L. J. 288.
4. L. R. (1907) 1 K. B. 264.

the consequent inapplicability, to this country, of English decisions under the latter rule have been pointed out by Wallis, J. in *Aiyathurai Ravuthan's case* [1]. The question may still remain whether in the present case, the plaintiff's right to relief as against the two defendants can be said to have arisen 'out of the same transaction or series of transactions.' We are inclined to think that it must be answered in the affirmative.

Chinna Pillai v. Venkatasami Chettiar: I. L. R. 40 M. 77.

No subject has given rise to so many conflicting, occasionally even hard and unreasonable judgments as mortgages. The conflict has shifted from point to point but happily, is showing signs of settling. *Merger* was for a time the bugbear of courts. On first mortgagee bringing a suit without making the second mortgagee a party and purchasing the property, it was held that his mortgage was merged in the equity of redemption and thereafter he could only sue for redemption. This is no longer the law. Nonjoinder was for a time regarded as a sin from which there was no redemption. Courts have shown an increasingly liberal attitude in recent years on this question. A considerable amount of complication arose for a time from the question whether in a mortgage suit, the subject-matter of the suit was the property itself so as to require the joinder of all mortgagees prior and subsequent. If a prior mortgagee was a necessary party to a suit for a sale by the second mortgagee a further question arose whether he should be redeemed or whether the property could be sold subject to the first mortgage. If perchance the second mortgagee held the first mortgage and that could not be sued upon a question arose whether the second mortgage could be sued upon at all. The legislature having declared that the first mortgage is not a necessary party to a suit for sale on the second mortgage, all these questions have ceased to be of importance.

A question which was mixed up with and was the result of the confusion above indicated was about the effect of a sale on the first mortgagee without making the second mortgagee a party. The view for a time though not uniformly, held was that the second mortgagee had only the right to redeem the 1st mortgage that being according to the view then held the only right he had whether

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1. (1908) 18 M. L. J. 238.

in a suit by himself or in a suit by the first mortgagee. On the view that the 1st mortgagee was not a necessary party, and even if he was a party, there could be a sale subject to his mortgage, that view necessarily gave place to the view that the second mortgagee had a right to sue for sale notwithstanding the sale on the 1st mortgage. This was clearly enunciated only in the Full Bench case in *Mullevatil Seethai* v. *Achutan Nair* [1]. There it was pointed out that redemption was a right and not a duty and the second mortgagee though he had a right could not be compelled to redeem the first mortgagee and that he could sell subject to the first mortgage notwithstanding the earlier suit and that his rights would not in any way be affected. Notwithstanding the decision of the Full Bench, it was held in *Venkatagiri* v. *Sadagopachari* [2], that the right of the 2nd mortgagee was only to redeem the first mortgage and that he could not sell subject to the earlier mortgage. Their Lordships held that the Full Bench decision was binding only in respect of the actual point referred and considered the reasonings as mere dicta and not binding. Their Lordships in this case rightly dissent from this narrow view of the force of the Full Bench decision. Mr. Justice Srinivasa Iyengar states the effect of the Full Bench decision in the form of propositions which will be found to be useful. The last of the propositions is one of considerable interest and may be said to be not altogether free from doubt. If the first mortgagee sues without making the second mortgagee a party and the second mortgagee also brings a suit without making the first mortgagee a party, and sales take place in both the view taken in *Venkatagiri* v. *Sadagopachari* [2], is that the sale first in point of time takes precedence so as to convey the ultimate equity of redemption. The ratio of that case is that it could not be said that either sale is affected by the vice of *lis pendens* both mortgagees being entitled to sell. No doubt, there is some authority in favour of this view but we should think, as Mr. Justice Srinivasa Aiyangar thinks, that the sale in the second mortgagee's suit should prevail. If both suits were properly constituted as to parties, the sale in the first mortgagee's suit should undoubtedly prevail. The second mortgagee's suit could not affect the title paramount of the 1st mortgagee to sell in a properly constituted suit the

1. (1911) 21 M. L. J. 213. 2. (1911) 22 M. L. J. 129.

entire interest mortgaged to him including the second mortgagee's interest. But in the case put, the first mortgagee's suit is not properly constituted as to parties and as such the sale in execution of the decree cannot stand on a higher footing than a private conveyance so far as the second mortgagee is concerned and must be affected by the *lis* of the 2nd mortgagee whose suit is properly constituted as to parties and can validly convey the interest of the mortgagor as against *all parties.* The lucid and convincing judgment in this case, it is hoped will set at rest the doubts raised by *Venkatagiri* v. *Sadagopachari* [1].

Subbaroya Goundan v. Ranganada Mudaliar: I.L.R. 40 M. 93.

S. 2 of the Revenue Recovery Act makes "the land, buildings etc." security for the *public revenue.* S. 42 makes the sale for arrears of revenue free of all encumbrances. The question in this case was whether this charge was available to the assignee of the Jodi payable to Government. Their lordships hold, not. The essential condition for the security to enure is that the dues must retain the character of *public revenue* which they necessarily lose on assignment to a private individual *Raja of Vizianagram* v. *Raja Setrucherla Soma Sekararaz* [2].

It is certainly open to question whether the charge given by S. 2 or the 1st charge given by S. 42 is enforcible except in the manner indicated by the Act. See *Kasturi Gopalaiyangar* v. *Anantaram Thiwari* [3]. In the analogous case of the Bengal Tenancy Act, their Lordships of the Privy Council held, that the charge for rent is only in favour of the landlord and is not available to an assignee of the rent or the landlord himself when he has parted with his interest in the land. When there is a *permanent* assignment of revenue not in the way in which it is assigned to the Inamdar or Zamindar so as to convert the revenue into rent, though no charge is available it may well be that Art. 131 is applicable to a suit for the recovery of the arrears *Manavikrama Raj* v. *Achuta Menon* [4], and not Art. 120 as held in *Raja of Vizianagaram* v. *Raja Setrucharlu Soma Sekararaz* [2].

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1. (1911) 22 M. L. J. 129.
2. (1902) I. L. R. 26 M. 686 at 710
3. (1902) I. L. R. 26 M. 730.
4. (1914) 26 M. L. J. 377.

NOTES OF INDIAN CASES.

Niwajkhan *v.* Dadabhai: I. L. R. 41 B. 166.

So the Bombay High Court has formally joined the Madras and Calcutta High Courts in putting a somewhat strict construction on the words of S. 20 of the Limitation Act, requiring that for the purposes of that section the fact of the part payment should appear in the handwriting of the person making the payment. The decisions in *Seshacharlu* v. *Seshaya* [1] and *Ellappa* v. *Annamalai* [2], have no doubt been always 'distinguished' as relating to *illiterate* persons who could not write; but the reasoning on which the one set of decisions rests is not really reconcilable with that underlying the other. Should the point come up for decision again, it may be open to argument that in the case of illiterate debtors (or agents) making payments, the provisions of S. 20 as to part payments *cannot* be availed of, because its terms cannot be complied with; but the impossibility of compliance will not justify our overlooking what is now laid down to be the plain meaning of the language used in the section. This is substantially the effect of the decision in *Joshi Bhaishankar* v. *Bai Parvati* [3], where the debtor was temporarily incapacitated from writing, and in *Jamna* v. *Jagha Bhana* [4], the Court, in following the early Madras cases, clearly intimated that it did so out of a desire not to disturb what was imagined to be a long settled rule.

Motibhai Jijibhai *v.* Desaibhai Gokhalbai: I. L. R. 41 B. 170.

The precise legal effect of certain documents familiar in the Revenue department is a matter of some importance in deciding questions arising under the Registration and Transfer of Property Acts, in respect of the transactions to which those documents relate. Take for instance, an application for transfer of patta in respect of a plot of ryotwari land, worth more than a hundred rupees. Suppose there is no independent document for the transfer of the land but in pursuance of an arrangement between the parties an application for transfer of patta to the name of the intended transferee is made by the transferor; or, as seems to be common in Bombay, a notice of relinquishment is given with a

1. (1883) I. L. R. 7 M. 55.
2. (1883) I. L. R. 7 M. 76.
3. (1901) I. L. R. 26 B. 246.
4. (1903) I. L. R. 28 B. 262.

request that the land may be granted to the intended transferee. Can this be put in evidence in a Court of law to prove the title of the transferee? The Bombay High Court seems to have frequently given effect to this kind of dealing (cf. *Tarachand Pirchand* v. *Lakshman Bhavani* [1], *Sakharam Pathak* v. *Bapu Sankar* [2], *Venkaji Narayan* v. *Gopal Ram Chandra* [3]); but most of those instances were cases to which the Transfer of Property Act had no application. Where however a registered document is prescribed by the law neither such applications nor any action taken by the Revenue authorities thereon nor even transfer of possession in pursuance of the understanding between the parties would suffice. As observed by the Judicial Committee in *Immudi Pattam Thirugnana Kondama Naick* v. *Periya Dorasami* [4], these 'would at the most do no more than give a starting point for the law of limitation.' But here again the question had frequently arisen, whether even for the purpose of the law of limitation such applications can be put in evidence to show the 'factum of transfer,' the commencement of possession or the nature of the claim under which possession was taken. This depends upon the application of S. 49 of the Registration Act; and as to this, the result of the case-law would seem to be that the section would exclude the document from evidence only when 'the change of legal relation to the property' is constituted 'by the expression of will embodied in the document' itself and not when the document merely recites the transaction as one already concluded, see *Sekharam Krishnaji* v. *Madan Krishnaji* [5] followed by a Full Bench of the Madras High Court in *Jeevaratnammal* v. *Varada Pillai* [6]; see also *Muthia Chetty* v. *Kothandaramaswami Chetty* [7] and *Usman Khan* v. *Nagalla Dasanna* [8].

In some of the Bombay cases however it has been suggested that where there is a relinquishment (or razinamah as it is there called) by the former occupant and a new patta (or kabuliyat) as between the Government and the intended transferee, the title of the transferee may be upheld as resting on a grant from the Government. Even in the present case Scott, C. J. would seem prepared to take that view, though Heaton, J. reserves his opinion

1. (1875) I. L. R. 1 B. 91.
2. (1886) I. L. R. 11 B. 174.
3. (1914) I. L. R. 39 B. 55.
4. (1900) I L.R. 24 M. 377 at 384.
5. (1881) I. L. R. 5 B. 232.
6. (1915) 19 M. L T. 52.
7. (1916) 31 M. L. J. 347.
8. (1912) I. L. R. 37 M. 545.

on the point. Both the learned Judges nevertheless agree in holding that so far as the title of the original occupant is concerned it is effectually extinguished by the razinamah (or relinquishment). Even for this purpose the document would be compulsorily registrable, but so far as the Bombay Presidency is concerned, that difficulty is obviated by the express exemption of such documents in S. 90 of the Registration Act. But apart from this we venture to doubt whether the razinamah can be dissociated from the avowed object for which it is given and the relinquishment treated as effectual independently of the effectuation of the transfer in favour of the intended transferee. It was not the intention of the original occupant really to *extinguish* his rights but only to transfer them and the intermediate vesting in the Government was but a step towards the transfer.

Raja Rajeswari Ammal v. Subrahmania Archakar : I. L. R. 39 M. 105.

If the question were *res integra* (a number of cases now think it is not) undoubtedly there is much to be said in favour of the view taken by Mr. Justice Sadasiva Iyer in *Sundarambal* v. *Yogavana Gurukal* 1 supported as it is by the view of the Privy Council in *Mohan Lalji* v. *Gobardhan Lalji* 2 where their Lordships subject the rule that the shebaitship vests in the heirs of the founder to a necessary exception, as their Lordships regard it, excluding persons disqualified from performing the duties of the office. In that case, the daughter's sons were excluded from the shebaitship of a Ballavacharyar temple on the ground that the daughter's sons were disqualified for the performance of the worship by the rules of the sect. The view of Jagannatha on the other hand as stated by him at p. 380, Colebrooke's Digest, seems to be "since a woman cannot preserve the office, it should be executed by her husband's daughter's son or other heir, but the produce should be enjoyed by the woman. However should the daughter's son be at variance with his maternal grandmother it may be executed by another person" but as he himself confesses later on "no more express ordinance is found to determine, consistently with usage the suits which arise on these subjects. If ordinances alone be received, there is no authority for establishing the rights of their

1. (1914) I. L. R. 38 M. 850.

2. (1913) I. L. R. 35 A. 283.

heirs and many excellent persons do not admit the rules of inheritance in these cases". The view of Jagannatha that the perquisites should descend to the widow and the duties to the daughter's son or other qualified heir, is so impracticable that he himself has found it necessary to suggest that if the latter declines the gratuitous task another substitute may be employed. Though it would undoubtedly have been more logical to hold that women cannot inherit unless the office can be executed by them or unless it is clear that their maintenance is an object of the trust, it is a question whether at this late hour it is right to unsettle the rights founded on the basis of the contrary view. Notwithstanding the rule here laid down, we have grave doubts if it would be open to the Courts to hold, in the face of the Privy Council decision above referred to that the daughter's son who is disqualified according to the rules of the institution by reason of his not belonging, say, to one of the families who can perform worship in the temple, is entitled to inherit the office and have the duties performed by a substitute.

Parameshwaram Munpee *v.* Narayanan Nambudiri: I. L. R. 40 M. 110.

As we said when dealing with *Chhabib Ram* v. *Durga Prasad*[1] the consent of the Advocate-General is required by S. 92 only to the institution of the suit and the further progress of the suit is under the control of the Court and having regard to the nature of the suit, the Court has ample power to order addition of parties, permit amendments or make such other orders as the exigencies of the case may require. In a case under S. 18 of the Religious Endowments Act, Mr. Justice Ayling is prepared to go further and hold that the death of one of the applicants for sanction before institution even would not affect the right of the others to institute the suit. He was of opinion however, that S. 92, C.P.C. would not permit the same though after institution of the suit, death of parties would not matter even in suits under that section. *Alagappa Chetti* v. *Muthiah Chetti*[2].

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1. (1915) I. L. R. 37 A. 296. 2. (1917) 33 M. L. J. 173.

NOTES OF INDIAN CASES.

Mohan Lal *v.* Indomati: I. L. R. 39 A. 244.

A document worded similarly was construed by a Full Bench of the Calcutta Court in *Raj Kumar Ramgopal Narayan Singh* v. *Ram Dutt Chowdhry* [1], as a mortgage. If as Mr. Justice Rafiq seems to think a charge might be spelt out of the document, the rulings of the Madras High Court, if followed, would have led to the further conclusion that the document was a mortgage. If covenant against alienation and declaration of invalidity of alienation contrary to the provision is one of the usual modes resorted to by parties to secure a charge, we do not think that the language of S. 58 of the Transfer of Property Act stands in the way of giving effect to such intention. That section does not say that the transfer must be a transfer in express terms. It may be an implied transfer. A bare covenant not to alienate even specific property may however stand on a different footing.

Emperor *v.* Husainkhan: I. L. R. 39 All. 293. Dissenting from each other without referring to a Full Bench which can settle the question once for all has unhealthy effect on the litigant public. It leaves law in an unsettled condition. It encourages litigation. It makes the position of honest parties as well as their legal advisers highly embarassing. The Privy Council has animadverted upon the practice but it does not seem to have had the desired effect either on the Allahabad High Court or the Madras High Court which seems to be the greatest sinner in this respect.

Surja Kunwari *v.* Harnarain Ram : I. L. R. 39 M. 311.

In this case, a testator purported to dedicate his property to religious uses but as a matter of fact only 400 Rs. out of the annual income of Rs.7,000 was required for those purposes. Under the circumstances their Lordships held that there was only a charge in favour of the idol and subject to that charge the property was to go to the heirs of the testator. The question has been recently considered by the Privy Council in *Jadu Nath Singh* v. *Thakur Sita Ramji* [2]. In that case their Lordships held that a gift to the family idol with a provision that half the income should go to the members of the family as remuneration for managing the charity was valid having regard specially to the smallness of the income of the property which was only Rs. 800 a year. If the income of the property had been large, their

1. (1870) 5 Beng. L. R. 264. 2. (1917) 21 C. W. N. 953.

Lordships say that a question might have been raised throwing doubt upon the integrity of the settlor's intention.

Referring to *Sonatun Bysack* v. *Sreemati Jagat Sundram Dasee* [1], and *Ashutosh Dutt* v. *Durga Churn Chatterjee* [2], their Lordships distinguish them by saying that in those cases though there was a gift to the charity in the first instance, later dispositions so cut down the original disposition as to make it clear that the later dispositions should prevail. In effect their Lordships' judgment is authority for three propositions.

(i) If the expenses of the charity come to but a very small portion of the income, from that fact a question may be raised as to the genuineness of the dedication.

(ii) Though there is an ostensible disposition in favour of charity, if there are other dispositions consuming the bulk, the charity might be reduced to a charge.

(iii) If there is a substantial disposition in favour of charity, a remuneration may be provided for out of the income to the family for managing the charity. These propositions do not of course preclude the application of the rule that if there is a dominant charitable intention the charity will prevail. It may be a question in cases where the disposition in favour of the family sins against perpetuity whether under the Hindu Law, on a principle similar to that recognised in *Ramanadan Chettiar* v. *Vava Levvai Marakayar* [3] the deed should be upheld and given effect to according to its tenor or the entire income should be applied to charity disregarding the disposition in favour of the family in so far as it violates rules as to perpetuity. In some cases, the disposition in favour of the charity may be so illusory that a charitable intention itself may be doubted and even a charge in favour of it may not be recognised.

But having regard to the liberal manner in which their Lordships are apparently prepared to view provisions for charity see *Ramanadan Chettiar* v. *Vava Levvai Marakayar* [3] a charge would generally be recognised. As to when a gift to charity is to be regarded as creating a charge and when it is to be regarded as effecting an absolute dedication, some tests have been laid down in *Kathan Mithirian* v. *Sivabaghiathammal* [4]. A modification in the views therein expressed may be required in the light of the Privy Council decision above referred to in cases where the surplus may reasonably be presumed to be intended as remuneration for the managers.

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1. (1859) 8 M. I. A. 66.
2. (1879) I. L. R. 5 C. 438.
3. (1916) I. L. R. 40 M. 116. (P.C.)
4. (1816) 4 L.W. 104.

NOTES OF INDIAN CASES.

Keymar *v.* **Visvanatham Reddi** : I. L. R. 40 M. 112 P.C.

In this case, their Lordships of the Privy Council hold that a judgment entered against the defendant on his default to answer interrogatories, is not one given on the merits within the meaning of S. 13, C. P. C. A judgment given on a point of limitation would similarly in their Lordships' opinion be a judgment not given on the merits. The clause refers, their Lordships say, to those cases where for one reason or another the controversy raised in the action has not in fact been the subject of direct adjudication by the court. It is not quite clear on the judgment whether under a procedure similar to ours where even *ex-parte* judgments can be passed only on evidence, the judgment cannot be said to be on the merits if all the questions arising in the case have been considered and decided.

Ramanadhan Chettiar *v.* **Vava Levvai Marakkayar** : I. L. R. 40 M. 116 P. C.

In this case their Lordships go further than the High Court and hold that where there is a substantial dedication to charity though there might be subsidiary provisions for the maintenance of descendants, the wakf would be wholly valid and must be allowed " to take effect according to its tenor." What the High Court did was to hold that the provision as to maintenance was invalid but that there being a substantial intention to dedicate to charity, under the Mahomedan Law, the whole property enured for the benefit of the charity. In this case, the amount required for the performance of charities in the customary way was only Rs. 360 which along with the pay of the mutwallis accounted only for 3/5 ths of the income. Nevertheless having regard to the intention of the settlor which was charity and the possible expansion of the demands of charity, their Lordships held that there was a substantial dedication to charity. Their Lordships' judgment is conclusive on the question that fateha is charity where part of the ceremony consists in feeding the poor. To the question put as to how the discretion of the trustees is to be controlled if they chose to starve the charity and thus swell the grant for maintenance their Lordships' answer is that the discretion of the trustees is not absolute that they must spend at least so much as a pious and charitable

Mahomedan would consider reasonable and if they fell below that standard, the Advocate-General or some other authority having control over the charities could compel them to do their duty.

Secretary of State for India *v.* **Birendra Kishore Manikya**: I. L. R., 44 C. 328.

This case affords another illustration of the principle that to entitle a party to avail himself of the exemption or protection afforded by special legislation, it must be clearly shown that the procedure prescribed by such special legislation has been strictly and properly followed. It is not uncommon to find this point referred to even in authoritative judgments as a question of 'Jurisdiction', but that term is apt to be misleading in this connection unless understood in a wide sense. In the present case their Lordships prefer to express the objection in the very popular language that "the whole proceedings fail for want of proper basis."

Satish Chandra *v.* **Jogendranath** : I. L. R. 44 C. 345.

The conclusion of Woodroffe and Chatterjee, JJ. seems to be the only one consistent with a proper interpretation of the restrictive words 'as against him' in S. 70 of the Evidence Act. Mr. Justice Newbould would seem to understand those words as indicating a contrast between the admitting party and other *parties* (if any) *to the document*, whereas the other two learned judges understand the contrast to refer to the *other parties to the suit.* Once it is admitted that in spite of the admission of a 'sole' party to the document, its execution may have to be proved as against other parties to the suit, the wide language of S. 68 would necessarily cover the case and the 'manner' of proof is limited by the terms of the section. Incidentally Woodroffe, J., re-affirms the criticsm, found in his book on Evidence, on *Jogendra Nath* v. *Nitai Churn* [1], in so far as it expressed an opinion that even as against the party admitting execution, the provisions of Ss. 68 and 69 should be complied with. On this point, the other two judges also agree with him.

1. (1903) 7 C. W. N. 384.

Kali Prasanna Sil *v.* Panchanna Nandi: I. L. R. 44 C. 367.

There can be little doubt that where there is a final decision in a suit by a Court of competent jurisdiction, a subsequent suit in respect of the same matter will be barred by the rule of *res judicata,* notwithstanding any expression of opinion or reservation, by the first court in favour of the institution of a second suit. But it will be erroneous, though not uncommon, to identify the rule under O. 23, R. 1 C. P. C. (S. 373 of the code of 1882) with the rule of *res judicata*; for, in the former case there is no 'decision' by the court but only a statutory bar to the maintainability of a fresh suit on the same cause of action. As pointed out by Mr. Justice Srinivasaiyangar in *Tulja Ram Rao* v. *Gopalaiyar* [1] the decision in the case under notice might well have been rested on the rule of *res judicata* alone and the observations in the judgment of Sanderson, C. J., on the effect of an order purporting to be under O. 23, R. 1, but not justified by its terms, would in that view be *obiter.* It seems to us however that the learned Judge did mean to rest his decision on that point as well and his Lordship clearly intimates that an order granting leave under that rule, if not justified by a proper interpretation of that rule, will be a nullity as one passed without jurisdiction. We respectfully agree with the observations of Justice Srinivasaiyangar in the Madras case above referred to that it is neither necessary nor safe to allow an improper order under the rule to be *collaterally* attacked as a nullity.

Ram Narayan Singh *v.* Adhindra Nath Mukerji: I. L. R. 44 C. 388.

It is perhaps not easy to reconcile all the reported cases in India dealing with the question, whether or not, the terms of the particular mortgage bond before the Court in each case, there was a personal liability. The present decision of their Lordships would, however, seem to lend the weight of their approval to such of them as start with a presumption that, "a loan *prima facie* involves a personal liability," and hold that those who contend for the exclusion of such liability must show that the nature and terms of the security clearly exclude it. Their Lordships' decision impliedly confirms the view laid down by the Full Bench in *Pulaka Veetil*

1. (1916) 32 M. L. J. 434.

v. *Thiruthipalli Madhava Menon* [1] that the non-attestation of a mortgage document, though it may render it inoperative *qua* mortgage, does not preclude the enforcement of any personal liability thereunder.

There is one point in the Judgment under notice which it is not quite easy to follow. Dealing with the question of the alleged liability under clauses (b) and (c) of S. 68 of the Transfer of Property Act, their Lordships observe that, "the position of the mortgagor under this section cannot by reason of the non-attestation of the deed be better than it would have been if the mortgage had been duly attested." So far as clause (a) of the section is concerned the suit is founded on the personal covenant, but the right of suit given by clauses (b) and (c) may well be said to be an incident of the mortgage security, and if the security is invalid in law for want of proper attestation of the document, all rights of action arising out of the security would seem to be excluded as well. With all respect, we venture to doubt, if clauses (b) and (c) can be regarded as resting merely on the basis of a breach of contract, independently of the question of the validity of the security. Clause (c) for instance, proceeds on the footing of "the mortgagee being entitled to the possession of the property"; how can he be so entitled if the mortgage itself is inoperative? The disappointed mortgagee may have a remedy under some other principle of law, but the case cannot reasonably be said to be covered by S. 68.

Priya Sakhi Debi *v.* **Manbodh Bibi** I. L. R. 44 C. 425.

It may be that the general proposition stated by Sanderson, C. J. in this case, viz., that adverse possession affects only the interest of the person who is entitled to immediate possession would require some qualification as applied to certain cases but in the particular case before them, the learned Judges were certainly right in holding that the weight of principle and authority alike, is in favour of the view, that in the case of a simple mortgage, adverse possession against the mortgagor, commencing after the date of the mortgage, cannot *per se*, affect the remedies of the mortgagee against the mortgaged property.

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1. (1909) I. L. R. 32 M. 410 (F. B).

NOTES OF INDIAN CASES.

Venkatramana Ayyangar *v.* Kasturiranga Ayyangar : I. L. R. 40 M. 212. (F. B.)

Protection of *trusts* is of much deeper concern in this country than protection of *trustees* and it would have been a matter for great regret if their Lordships had held that an ordinary suit did not lie and also that S. 92, C. P. C, did not apply to the case. There is no offence to legal theory in permitting the worshippers to sue directly though it is a matter for the consideration of the legislature whether the protection afforded to trustees in England should not be afforded in this country also. In determining that question, the legislature would no doubt have to consider whether in the conditions of this country the Advocate-General would have sufficient leisure, knowledge or scope for doing justice as between trustees and trusts as the Attorney General in England. S. 92 of the Civil Procedure Code has had a restricted interpretation for a long time and the fact that the legislature did not choose to make the point clear when it had an opportunity to do so, raises a strong presumption in favour of the correctness of that restricted interpretation and the Full Bench did right in leaving the alteration of the law to the legislature.

As regards the question that arose in the case dealt with by the division Bench, it is worthy of note that in *Jalandhar Thakur v. Jharula Das* [1], the right of the shebait to the surplus offerings (presumably by custom) was recognised by their Lordships of the Privy Council. The point, however, was not raised. But is the custom necessarily invalid? If as a matter of fact from a time the beginning whereof is not known a particular kind of offerings has gone to the Archaka as his pay, is a lawful origin incapable of being attributed to such a usage? If all kinds of offerings go to the Archaka, leaving none for the other purposes of the temple, it may not be a good arrangement. Let us take it that at the time the temple was founded, there was not enough or there was nothing to pay the Archaka and in those circumstances, the court thought or the ruler, at the time, thought that the arrangement was good. Could he not have settled a scheme permitting such a course? A permanent alienation is no doubt ordinarily not good but it is not prohibited altogether. Necessity might

1. (1914) I. L. R. 42 C. 244. (P. C.)

justify it, a strong necessity, it may be. It is not impossible, therefore, to presume a legal origin and if it is not impossible, why should not a practice of long duration be recognised? In this case apparently the usage did not justify the inference of unalterable arrangement. There is much to commend in the point of view suggested by their Lordships' judgment. In the absence of the clearest indication of an unalterable arrangement, from mere perception however long continued of profits by the Archaka, the court should not infer a right to perception for ever. "Unless constrained thereto by unavoidable necessity" it is breach of duty on the part of a shebait to grant a lease in perpetuity and such a grant will not be presumed. *Shibeswari Debia* v. *Mathuranath Acharjee*, [1] *Mayandi Chetti* v. *Chokkalinga Pillay* [2], *Palaniappa Chetty* v. *Sreemath Devasikhamani Pandara Sannadhi* [3]. There is no reason why a different rule should apply to the income by offerings, the one income which presents infinite possibilities for expansion.

But is the arrangement absolutely void? Would it not be good for the trustees' life-time or at least till another arrangement is made. If it is not void, would the perception of profits give rise to a fresh cause of action? In *Jalandhar Thakur* v. *Jharula Das* [4] the alienation of the profits was void. The cause of action to declare the arrangement bad should certainly be barred after six years. What would not be barred is the sue for declaration of the right of the temple to receive the profits of any particular year or thereafter. Of course, the difference between declaring the arrangement bad and the other declaration is not very tangible.

Chidambaram Chettiyar *v.* Krishna Vathiyar: I. L. R. 40 M. 233.

There is much to be said in support of the point of view of Mr. Justice Phillips. The word "stay" has been deleted from the section and the arrangement pleaded practically varies the decree. If really legislature intended that these agreements should be pleadable, it is strange that it should not have provided special articles of limitation, S. 47, O. 21 R. 2 and O. 21 R. 16 all would *prima facie* seem to assume a decree already in existence. They concern themselves with post decree arrangements, assignments, and agreements and not ante-decree arrangements. If you cannot add to the decree, it seems to be difficult to see how effect is to be given

1. (1869) 13 M. I A. 270.
2. (1903) I. L. R. 27 M. 291.
3. (1917) I. L. R. 40 M. 709. (P. C.)
4. (1914) I. L. R. 42 C. 244. (P. C.)

to such an arrangement. Injunction cannot be granted on application by the judgment debtor. A curious question might arise if for instance the agreement is to stay the execution for 4 years. An application for execution thereafter may be barred. One answer that readily would occur is that if parties enter into such foolish engagements, they have to thank themselves. Any how, it illustrates the difficulties in the way of accepting the conclusion of the majority as sound. The alternative consideration that weighed with the majority is the course of practice which no doubt is not a negligible circumstance.

The Secretary of State *v.* Srinivasacharyar: I. L. R. 40 M. 268.

While property in the Government might be conclusive on the question of the right to charge for the minerals we do not think that property in the Inamdar would necessarily be equally conclusive the other way. The question is—has the Crown parted with its right to charge for the minerals, if worked ? The right to work the minerals is conceded to the ryotwari proprietor, the Government having the right to charge. The Government's proprietorship of the soil may be a compendious way of stating its superior rights of assessing but all the implications of the so-called proprietorship were never accepted, on the other hand were promptly repudiated by the Privy Council in *Oolagappa Chetty* v. *The Collector of Trichinopoly* [1]. We do not see why the ryotwari proprietor is not quite as much the owner of the minerals as the Zemindar or the Inamdar except that in favour of the Zemindar there is an express legislative declaration as to ownership of the soil. S. 2, Reg. 25 of 1802. None is on the footing of a perpetual tenant.

The tenant has only the right of *possession* and *enjoyment*. He cannot use the property for a purpose other than that for which it is let. He cannot do any act which is destructive of or permanently injurious to the holding. As a result, he cannot work the mines which are not open at the time the lease is granted (see S. 108, Transfer of Property Act.) None of these considerations applies to *proprietors* or landowners like Inamdars and holders under the ryotwari system. Sec. 2, Reg. 26 of 1802, S. 134, Estates Land Act, Secs. 1 and 2, Revenue Recovery Act, S. 2 of the Land Encroachment Act. But, as we said, property in the minerals is not conclusive of the question. The Crown may have the right to

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1. (1874) 14 Beng. L. R. 115

charge though the property is in the Inamdar. The enfranchisement did not affect any rights in the land possessed by others but we should think it a violent reading of Act VIII of 1869 to hold that the Government's rights are not affected, *ex concessi* Government's right of reversion being affected. Reading the title-deed, in the case, it is impossible to see how the Crown could, after conferring a free-hold estate "subject only to the payment of the quit rent" claim either a right to the minerals or a right to charge for them. Cf. *Lutchmee Doss* v. *Secretary of State for India* [1]; *Kandukuri Mahalakshmama* v. *Secretary of State for India* [2]. Whether or not it enlarges the content of the Inamdar's right, it at least, must have the effect of preventing the Government from claiming anything in addition to the payment of quit rent.

The words in the original grant "perpetual shrotriam" for the sum of 78 pagodas *prima facie* would seem to be inconsistent as much with the reversionary right of the Government as with the claim to a separate charge for minerals. If the right to resume on failure of heirs could be presumed from the nature of the grant, one might say it could with equal liberty, also be inferred from the words "produce of the seasons" and from the mode of enjoyment of the Inam taken along with the rule of construction in favour of the Crown, that the right conferred and the liability imposed is only with reference to the then prevalent or contemplated sources of income from the Inam. But we think that the process of reasoning is wholly wrong for it has, in the back of it, some theory of landlord and tenant. The grant in all cases, whether zamindari, ryotwari or inam, we think, is an absolute grant for all purposes. What gives the Crown the right to charge for minerals is the right it possesses to vary the assessment. When once the assessment is fixed, the Crown's right to vary the assessment is gone and with it the right to charge for new sources of income.

Kamayya *v.* Papayya: I. L. R. 40 M. 259.

We indicated our view as regards *Choragudi Chinnakotayya* v. *Raja Varadaraja Appa Rao* [3] when dealing with *Afzal Begam* v. *Akbari Begam* [4] and we think the Full Bench did right in overruling that case. In *Ravaneshwar Prasad Singh* v. *Baijnath Ram Goenka* [5] a suit was permitted to be withdrawn by the Privy Council.

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1. (1909) I.L.R. 32 M. 456.
2. (1910) I.R R. 34 M. 295.
3. (1919) 27 M. L. J. 244.
4. (1915) I.L.R. 37 All. 326.
5. 1915) I. L. R. 42 C. 897.

NOTES OF INDIAN CASES.

Allahabad Bank, Ld., *v.* Moti Lal Barman : I. L. R. 44 C. 448.

The equitableness of the decision in this case can perhaps be scarcely disputed, but we are not sure that some of the questions raised by the mortgagor are altogether free from doubt. The appeal related to the right of a mortgagee, who had obtained a preliminary decree for sale, to include in the final decree certain amounts which under orders of the court he had paid, after the preliminary decree, to discharge arrears of rent that had accrued due in respect of the mortgaged property. So far as we are able to gather from the report, the mortgage does not appear to have been usufructuary and there is nothing to show the period of time to which the arrears related nor the circumstances under which an order of Court came to be made for the payment thereof by the mortgagee.

It may be accepted as a general principle that in mortgage suits the final decree should embrace the whole subject of the mortgage transaction and afford a complete adjustment of all rights of the parties arising therefrom up to the date of the judgment or even up to the time when it is ultimately carried into effect. (See for instance, *Vinayak* v. *Dattatrya* [1]). We are also aware that more than one case in Madras has held that circumstances may arise which will justify a court in revising, in the course of *execution proceedings*, the amount fixed in a decree for redemption. (Cf. *Ramunni* v. *Shanku* [2]; *Krishna Pattar* v. *Srinivasa Patter* [3]). And it is also clear that O. 34, R. 10, Civil Procedure Code contemplates a 'final adjustment' of accounts even after decree. But the difficulty in the present case arises partly from the language of O. 34, R. 5 and partly with reference to the claim of the mortgagee to *add* the amount (paid by him) to the mortgage-money, so as to make the security cover such amount also. O. 34, R. 2 (in the case of foreclosure decrees) and O. 34, R. 4 (in the case of decrees for sale) provide for the amount due to the mortgagee being fixed with reference to a certain date and, thereafter, allow a period, up to six months, for payment. Rules 3 and 5 provide for what is to happen when the mortgagor either makes the payment or omits to make the payment within the time fixed. In both the rules, the only addition authorised to

1. (1902) I. L. R. 26 B. 661. 2. (1886) I. L. R. 10 M. 367.
3. (1896) I. L. R. 20 M. 124.

be made to the amount already declared due is that of "subsequent costs" mentioned in Rule. 10, which clearly refer only to "costs of suit." The mortgagor may therefore well contend that on his depositing in court the amount declared due (with the subsequent costs aforesaid) he is entitled to redemption and there is nothing in the section authorising the mortgagee to insist upon being paid at that stage any disbursements made by him after the preliminary decree. The position is no doubt somewhat anomalous, but in the face of the clear language of the rule it would be hardly safe to invoke the doctrine of inherent power. Nor do we see how, at any rate under the scheme of the new Code, S. 47 of Civil Procedure Code can be called in aid, especially when the attempt is to *add* to the amount payable under the decree.

As to the substantive rights of the mortgagee in this connection, it will be instructive to compare the provisions of S. 65 of the Transfer of Property Act with those of S. 72. In the latter case the section expressly provides for sums disbursed by the mortgagee being added to the principal money. But under the former section the mortgagee is only given an indemnity against losses arising from the default of the mortgagor to pay rent etc., in respect of the secured property. In view of this difference we doubt if there is any general rule authorising a mortgagee *not in possession* to add to the mortgage-money all expenses incurred by him in saving the property from sale, forfeiture or any other kind of loss. The case of public revenue may perhaps stand on a special footing. (Cf. for instance *Upendra Chandra Mitter* v. *Tara Prosanno Mukerji* [1]) and the analogy cannot be extended to items, like rent, which do not by themselves form a charge on the property. The reference to the arrears having been paid by the mortgagee *under an order of Court* suggests that O. 39, R. 9, of the Code was perhaps in the mind of the parties. But the benefit of that rule is confined to payments made when the land or tenure "is ordered to be sold," and does not seem to extend to payments made in anticipation; and it is by no means clear whether even under that section the amount so paid can be added to the *secured amount*. The rule evidently refers to such sums being "charged" in the adjustment of accounts and not to their being charged on the land.

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1. (1903) I. L. R. 30 C. 794.

NOTES OF INDIAN CASES.

Shrinivasdas Bavri v. Meher Bai: I. L. R. 41 B. 300 (P. C.)

It is rather remarkable that the Courts in India and the Judicial Committee should have come to contrary conclusions on what is to all appearance a simple question *viz.* whether or not a vendor had made out "a title, free from all reasonable doubt," to the property contracted to be sold. The difference of opinion turned on the nature and degree of proof to be furnished by the vendor, as to the discharge of a prior encumbrance. A formal release deed from one of the mortgagees was produced, but it was not shown that another person who was a co-mortgagee had been dead at the date of the release and the releasor was his heir. There can be no doubt, as held by their Lordships, that any recitals in the release-deed will be of no avail as against persons not parties thereto. The High Court, both on the original side and in appeal, thought that the fears of the vendee as to the effectiveness of the release-deed were unreasonable; but the Privy Council take a different view. The decision is no doubt based upon the express agreement on the part of the vendors to deduce, "a marketable title free from all reasonable doubts." But we presume the same result must follow even under the general rule of law that a vendor cannot have specific performance if he is unable to "give the purchaser a title free from reasonable doubt" (S. 25 of the Specific Relief Act). The decision makes it clear that the rule covers not merely a doubt as to title in the sense of the very right to convey, but also doubts as to freedom from encumbrances.

Nero Gopal v. Para Ganda: I. L. R. 41 B. 347.

The rule against the recognition of a power of gift in a member of an undivided Hindu family has now become one of diminished importance, in view of the enunciation of the doctrine of partition by unilateral declaration of intention. The Madras High Court has held that the declaration may be contained in the very document by which the disposition (whether testamentory or inter-vivos) is effected. *Aiyavier* v. *Subramanya Iyer*.[1] It is only necessary that the declaration should be duly communicated to the other co-parceners. It is however, not clear when exactly

1. (1917) 32 M. L. J. 489.

the declaration takes effect so as to create a severance in status: is it the moment that it is made and if so, what is the precise effect of the communication required to be made? Suppose a testator makes such a declaration in his will, but before it is communicated to, or the communication reaches his co-parceners, he dies; does the will take effect or not? The new theory laid down by the Privy Council is not without problems of a new kind attending in its train and it remains to be seen how Courts in India will steer between its disintegrating tendency on the one land and the rules laid down in the earlier cases favouring the integrity of the co-parcenery system, on the other.

In the case under notice an alienation had been made by a father in consideration of a barred debt. This could by no means be regarded as really in the nature of a gift even within the meaning of the stricter rule of the earlier cases (cf. for instance, *Natesa Iyer* v. *Rathai Ammall* [1], and the learned judges rightly held that the transaction was binding as against the father's share. We are not quite satisfied as to the propriety of holding that it would not be binding as against the son's share.

Suppose the father had given a promissory note agreeing to pay the barred debt; can it really be contended that the obligation to repay it will not be within the rule as to the son's pious duty to pay his father's debts? If a decree could be obtained against the father on foot of that promise, is it an illegal or immoral debt, so as to disentitle the creditor from proceeding to realise it by execution from the family property? If a widow can repay a barred debt and alienate property for that purpose, if any executor can pay a barred debt of the testator, it will be a strange limitation of the doctrine of the pious obligation of the sons to hold that a father will be committing a breach of trust by paying a barred debt of his, from out of family funds. The decision in *Subramanya Aiyar* v. *Gopala Iyer* [2] does not bear on this aspect of the question. It only held that no suit can be maintained against the sons in respect of a barred debt of the father. As laid down in that very case, the debt is not *extinguished* by the lapse of time and it will not cease to be an 'antecedent debt' for the purpose of supporting an alienation merely because it is no longer enforceable by a suit.

1. (1908) 19 M. L. J. 62. 2. (1909) I. L. R. 33 M. 308.

As to the effect of fluctuations in the number of members in the family after an alienation by one member, the present case follows the later Madras view, departing from the illogical position suggested in the *obiter dictum* in *Gurulingappa* v. *Nandappa* [1].

Ganesh Narayan *v.* Gopal Vishnu : I. L. R. 41 B. 357.

It is a pity that there should yet remain any uncertainty as to the law applicable to the rights acquired by a mortgagee purchaser, in execution sales, the equity of redemption in the mortgaged property. We cannot help feeling that the language in which the Privy Council expressed themselves on two or three occasions when the question arose before them in some form or another has not helped to a proper understanding of the law. Thus for instance, in *Mahabir Prasad* v. *Macnaghten* [2] their Lordships distinguish *Kamini Debi* v. *Ramlochan Sirkar* [3], on the ground that in that case the mortgagee had probably not obtained leave from the court to purchase; and this lends colour to the view that a purchase without leave, by a decree-holder who is also mortgagee, can be treated by the mortgagor, (judgment-debtor) as practically *null and void*, whereas, if the matter is to be decided with reference to O. 21. R. 72, C. P. C. (S. 294 of the Old Code) the absence of leave only gives the executing court *a discretionary power* to set aside the sale on application. Neither *Raja Kishendatt Ram* v. *Raja Mumtaz Allikhan* [4], nor *Khiarajmal* v. *Diam* [5] has sufficed to indicate clearly to the Courts in India whether or not they are to impose on a mortgagee a *general* disability, somewhat wider than that enacted by statutory provisions, in respect of the purchase of the equity of redemption. Not to speak of earlier decisions like those in *Martand* v. *Dhondo* [6] and *Erusappa Mudaliar* v. *Commercial and Land Mortgage Bank Ld.* [7], for these have to some extent been departed from in later Cases— a bench of the Calcutta High Court laid down as late as 1910, that, "independently of the provisions of the Transfer of Property Act, it is a well established principle that a purchase by the

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1. (1896) I. L. R. 21 B. 797.
2. (1889) I. L. R. 16 C. 682.
3. (1870) 5 Ben. L. R. 450.
4. (1879) I. L. R. 5 C. 198.
5. (1904) I. L. R. 32. C. 296.
6. (1897) I. L. R. 22 B. 624.
7. (1899) I. L. R. 23, M. 377.

mortgagee of the equity of redemption constitutes him a trustee for the mortgagor and that he does not on such a purchase acquire an irredeemable title.". *Pancham Lal* v. *Kishun Pershad* [1]. In this last mentioned case, the learned Judges held that where there was a sale and purchase by the mortgagee in contravention of S. 99 of the Transfer of Property Act, the mortgagor was, in spite of the lapse of 15 years from the confirmation of the sale and without any proceedings in the execution court to have the sale set aside, entitled to treat his right of redemption as still subsisting, subject only to the obligation of reimbursing the mortgagee for his expenses. In a recent case before the Madras High Court the same question was decided otherwise. (*Arjuna Reddy and another* v. *Venkatachala Asari* [2]), but the learned Judges express themselves with considerable hesitation and point out the state of the authorities. The Allahabad High Court has to some extent settled the point by a Full Bench decision in *Lal Bahadur* v. *Abharan Singh* [3]; but even that does not seem to cover the whole of the uncertain ground.

The case now under notice is the latest pronouncement of the Bombay High Court in this connection. The purchase by the mortgagee in this case would seem to have been in contravention both of S. 99 of the Transfer of Property Act and of S. 294 of the Civil Procedure Code of 1882. It is clear that both the learned Judges substantially differ from the rule as stated in *Martand* v. *Dhondo* [4], and would confine the mortgagee's equitable disability to cases clearly falling under S. 90 of the Trusts Act. They also recognise that the contravention of S. 99 of the Transfer of Property Act and S. 294 of the Civil Procedure Code only constitutes an irregularity of procedure which may entitle the mortgagor to take steps in time to have the sale set aside but does not involve a breach of trust so as to nullify the apparent effect of the court sale. All the High Courts, except Calcutta have thus come to take a substantially uniform view and we hope there will not be much further room for uncertainty.

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1 (1910) 12 C. L. J. 674.
2. (1915) 19 M. L. T. 121.
3. (1915) I. L. R. 37 A. 165.
4. (1897) I. L. R. 22 B. 624.

NOTES OF INDIAN CASES.

Laxmipathy Rao *v.* **Venkatesh** : I. L. R. 41 B. 315.

In spite of lengthiness of the judgment the points raised and decided in the case are fairly simple and not of very much importance for, the system of Dwamushyayana adoption has become almost, if not altogether, obsolete. The father of the adoptee though a natural brother of the adopter had himself been given away in adoption to another branch of the family and it seems to us that this by itself was sufficient answer to the argument founded on the texts relating to the adoption of a *brother's* son. For it is impossible to hold that even after adoption, a person continues to be the brother, within the meaning of these texts, of his natural brother. In view of the somewhat inaccurate observations in recognised text-books like those of Mr. Mayne and Mr. Sarkar, the learned Judges however did well in pointing out that there is nothing in the texts of Hindu Law or in the decision of the Privy Council to justify the view that where the only son of a brother is adopted it must *prima facie* be presumed to be a Dwyamushyana adoption.

Govind Bhikaji *v.* **Bhan Gopal** : I. L. R. 41 B. 384.

It will indeed be a regrettable state of the law of the Court had felt itself constrained to come to a different conclusion in this case. The decision in *Shamu Pattar's case* [1] is inconvenient enough and neither authority nor convenience requires any further strictness in the working of the rule about attestation. A scribe is not as such disqualified from being an attestor though whether in any particular case he intends to subscribe his name merely as the writer or also as an attestor may depend on the circumstances of each case.

The judgment states the point as one of the validity of the attestation within the meaning of S. 59 of the Transfer of Property Act, but the statement of facts seems rather to suggest that the question arose with reference to sufficiency of proof in view of S. 68 of the Evidence Act, for it is expressly stated that the document was attested by two independent witnesses besides the scribe,

1. (1912) I. L. R. 35 M 607 (P C.)

It may further be taken as fairly well settled that the attesting signature need not on the face of it *purport* to be that of a witness—though the passage quoted from *Burdett* v. *Spilsbury* [1] in *Ramu* v. *Laxman Row* [2] is capable of being misunderstood, but two things must concur *viz.*, that the alleged witness must have been present at the *execution* of the document and he must have put his own signature (or mark) thereon with a view 'to vouch the execution.' Cf. *Badri Prasad* v. *Abdul Karim* [3], *Param Hans* v. *Randhir Singh* [4] and *RamBahadur* v. *Ajodhya* [5].

Sripat Singh Dugar *v.* Prodyat Kumar Tagore: I. L. R. 44 C. 524.

As pointed out by Mr. Justice Sastriar in *Peda Venkanna* v. *Sreenivasa Dikshatulu* [6], this case is the latest instance of the recognition, by the Judicial Committee, of the rule that in execution of a decree against a Hindu father the undivided shares of the sons in the joint family property could be brought to sale *even during the life-time of the father.* And we respectfully agree in the view, taken in the Madras case above cited, that the decision in *Sahu Ramachandra* v. *Bhup Singh* [7] cannot "be taken to overrule by implication the whole current of authorities during the past thirty-five years", on the question of the creditors' remedies in execution. We cannot however disguise the fact—and that is recognised by Mr. Justice Sastriar—that their Lordships' latest pronouncement, to some extent, modifies the prevalent doctrine as to the son's liability. In the words of the learned Judges, "the decision makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son only arises when the assets of the father are insufficient, assuming that it arises at all during the life time of the father." His Lordship thinks that this limitation is entirely in accordance with the Hindu Smrithis, but he does not indicate how the limitation is to be given effect to, practically. To say that law is not always logical, is, if we may respectfully say so, little better than a confession of the anomaly of the situation.

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2. (1818) 10 Cl. & F. 340.
2. (1908) I. L. R. 33 B. 44.
3. (1913) I. L. R 35 A. 254.
4. (1916) I L. R. 38 A. 461.
5. (1916) 20 C. W. N 699.
6. (1917) 33 M. L. J. 19.
7. (1917) L. R. 44 I. A. 126.

With reference to the facts of the case under notice, it is not clear whether the proceedings arose out of a mortgage decree or a simple money decree. In the head-note, as also in the report of Sir Robert Finlay's arguments, the transaction is described as arising out of a mortgage. But in the statement of facts, the only reference is to an attachment and sale in execution of two money decrees and the judgment throws no light on this point. If it was a mortgage decree we presume that the onus would have been laid on the decree-holder to show that the mortgage was for an antecedent debt, or for other family purpose and was as such, binding on the sons.

Abdul Majeed *v.* Krishnamachari: I. L. R. 40 M. 243.

The principle of Hindu Law according to which one co-heir acts as manager for others used to be said to be unknown to Mahomedan Law with one exception recognised in *Pathummabi* v. *Vittil Ummachabi* [1]. That exception too is shown by Mr. Justice Abdur Rahim in this case to be unjustified. This does not preclude the application of the principle of *executorship de son tort.* An executor *de son tort* has ordinarily only the duties and none of the rights of an *executor de jure* but his dispositions in favour of alienees *bona fide* in the course of administration have sometimes been upheld. This principle obviously cannot apply when the purchaser knows the true state of affairs. As Mr. Justice Srinivasa Iyengar points out other considerations might apply to suits where even a few of the co-heirs might effectively represent the whole body. But those considerations have nothing to do with Mahomedan Law and depend upon general jurisprudence partly resting on the principle above referred to, partly upon the courts' duty and power to determine finally the question as to who is the legal representative, and partly upon the solicitude of courts to support court sales in favour of innocent purchasers for value.

Muthuveerappa Chetty v. Ramasami Chetty: I. L. R. 40 M. 285.

When money is paid by A to B under coercion in payment of a debt justly due is the latter entitled to plead the same in an action for the recovery of the money? Mr. Justice Seshagiri Iyer thinks, he is. S. 72 of the Contract Act which confers the right to claim it back, does not expressly reserve this right. In the

1. (1902) I. L. R. 26 M. 734.

case of contracts induced by fraud, undue influence and coercion, in Ss. 19A and 65 of the Contract Act, the restoration of the advantage got under the contract is provided for. S. 41 of the Specific Relief Act provides for cases in which cancellation of an instrument is asked for. When a court sale is set aside on the ground of fraud or irregularity the court has power to provide for the payment of the amount due to the decree-holder, *Ganga Pershad Sahu* v. *Gopal Singh* [1]. In the case of *ultra vires* and illegal contracts, a similar view is stated in Leake at p. 551.

It may be that in cases of extreme high-handedness the court has a discretion. The conclusion suggested is certainly equitable.

Subba Rao *v.* **Rama Rao**: I. L. R. 40 M. 291.

Art. 62 was intended to cover the well-known English form of action for money had and received to the plaintiff's use. In England this form of action is not available to co-owners, but in India it has been held to be. The action is distinct from the action of account which lies in all cases of accountable relationship. The case in hand being in effect of one co-owner appointed agent of the other, the action of account is the more appropriate description for the action. Arguments based upon the third column have recently been disapproved of by the learned Chief Justice, but cannot be said to be finally so, other judges being in favour of them, *Mulla Veetil* v. *Kunhi Pathumma* [2].

Ramayya *v.* **Krishnamurthi**: I. L. R. 40 M. 296.

Order 21, R. 2 cannot apply to payments which are not intended to be payments in whole or partial satisfaction of the decree. Payment made with a view to procure assignment of the decree is obviously not payment of that description. What is paid is not money payable under the decree. Again, O. 21, R. 2 Cl. (3) we think, prohibits only the recognition of payments as *payments*. It does not prohibit evidence being adduced of payment to prove that the transfer is benami for one of the judgment-debtors. Payment by him is a material item of evidence in the proof of benami, but thereby, it cannot be said that the Court recognises the payment. It is otherwise for instance, where payment is relied on to save limitation, or to set aside a sale in execution as unauthorised or improper owing to such *payment*.

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1. (1884) I. L. R. 11 C 136. 2. (1917) 33 M. L. J. 820.

NOTES OF INDIAN CASES.

Chhatrapat Singh Dugar *v.* Kharg Singh Lakshmi Ram: I. L. R. 44 C. 535.

This case affords an interesting illustration of the way in which the power under O. 41, R. 11, C. P. C. is sometimes exercised. The appeal arose out of a debtor's application in insolvency; the Court of first instance, in dismissing the petition *in limine*, thought that the points raised before it were so clear that it deemed it unnecessary to go into evidence on the question of the alleged abuse of the process of the Court. On appeal, two learned Judges of the High Court thought fit to dismiss the appeal under O. 41, R. 11, without any discussion of the merits of the case. An application for review also proved of no avail, but when the matter goes before the Judicial Committee their Lordships think the point quite clear, the other way. As to the power of the Insolvency Court, they lay down (in accordance with the preponderance of authority in India) that once the conditions laid down in the Act are satisfied an order of adjudication must follow as a matter of course and that the question of the misconduct of the debtor is a matter for consideration not in the initial stage, but when the debtor's application for discharge comes before the Court.

On one point of procedure raised in India their Lordship's judgment is altogether silent, *viz.*, the competency of an appeal to the Privy Council; and we see no reference to it in the arguments of Counsel, as reported. It is a curious coincidence that the judgment of their Lordships in the case was delivered by Sir Lawrence Jenkins who had himself (when in India) granted leave to appeal: See *Chatrapat Singh Dugar* v. *Kharag Singh Lachmiram* [1]. Even at that stage he followed his own decision as Chief Justice of Bombay in *The Bombay Burmah Trading Corporation, Ltd.* v. *Dorabji Cursetji Shroff* [2]. The leave was granted on the broad ground that once there is a decree or final order of the High Court, the incident of appealability attaches to it under the Letters Patent and S. 109, C. P. C., and that it makes no difference for this purpose that the proceedings arose under a special Act, which itself contains no provision for appeal to the Privy Council. The way in which the question of the

1. (1913) I. L. R. 40 C. 685. 2. (1903) I. L. R. 27 B. 415.

right of second appeal, in proceedings under the Madras Rent Recovery Act, was dealt with by the Privy Council in *Ravi Veeraraghavulu* v. *Sri Rajah Venkata Narasimmaha*[1], would seem to lend support to this interpretation of the law.

Maung Shwe Goh v. Maung Inn; I. L. R. 44 C. 542 (P. C.)

It is not quite clear why the amount of money to be paid into court by the vendee was not in this case fixed by the specific performance decree itself. The agreement provided that the sale was to be for a lakh of rupees but as the vendee had a mortgage debt due to himself from the vendor, it was agreed that that amount with interest should be deducted from the sale price and the balance paid to the vendor. In the ordinary course, the decree itself, when directing specific performance, would have fixed the amount to be paid into court by the vendee and the date for such payment; and on the vendee depositing that amount in court, he would have been entitled to get a conveyance executed either by the vendor or by the court. From the time that a conveyance is so executed (and registered where necessary), the ownership of the property will vest in the vendee and he will be entitled to claim mesne profits as from that date, if the vendor does not put him in possession. In the present case the question of the ascertainment of the amount payable was somehow allowed to be raised in execution proceedings, the original decree merely referring to the agreed price of one lakh of rupees without making provision for the deduction of the amount due on foot of the mortgage and the result is that courts had to treat the mortgage as an independent transaction, outstanding as such, even after the decree for specific performance by the Lower Appellate Court. If this position is to be logically carried out, it is difficult to see how the claim under the mortgage can properly be dealt with *in the execution stage.*

On the substantive question raised their Lordships have, in the circumstances, preferred to base their conclusion on the *express* terms of the agreement, though the judgment makes a passing reference to the difference between the rule in England and the rule under the Transfer of Property Act as to the

1. (1914) I. L. R 36 M. 443.

time from which the purchaser of immoveable property becomes the owner, so as to be entitled to the rents and profits of the property and to be liable for interest on the purchase money.

Hem Chandra Biswas *v.* **Purna Chandra Mukherji**: I. L. R. 44 C. 567.

The contention in this case was that where a debtor made a payment to his creditor generally on account, *i. e.*, without specifying whether it was towards principal or towards interest, it would not serve to save the bar of limitation, in respect of the balance, though the payment was evidenced by a document in the handwriting of the debtor. This is obviously going too far for the words 'as such' occur in S. 20 of the Limitation Act only in connection with payment towards 'interest' and not as regards payment towards principal, so that, if the payment is not held to be one by way of interest, it necessarily goes in reduction of the principal. This no doubt would lead to some conflict between the rule of the Limitation Act and the rule of the substantive law for, under the latter, the creditor has the right to appropriate the payment towards interest. If the creditor had so appropriated it in his accounts at the time the payment was made or even in the plaint—and this is what happened in the present case—it may be argued with some force that the payment was not treated by either party as one towards the principal. But it would be scarcely just that the Court should for one purpose hold that it was not a payment by way of interest and in the same breath hold for another purpose that it was not a payment towards principal either. Where there are more debts than one there may be greater complication in assigning a general payment distributively towards them. But the extent to which the Court may go even in such a case is shown by the decisions in *Soumia Narayana Iyengar* v. *Alagirisami Iyengar* [1], and *Hingumiah* v. *Heramba Chandra* [2]. In the latter case, the Court permitted the plaintiff to get over the bar of limitation on a ground different from and indeed inconsistent with that alleged in the plaint for the purpose.

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1. (1912) 11 M. L. T. 429. 2. (1910) 13 C. L. J. 139.

Venkati Rama Reddi *v.* **Pillati Rama Reddi :** I. L. R. 40 M. 204 (F. B.)

This case proceeds on the view that where the donor has handed over the gift deed to the donee putting him in a position to present the deed for registration he has done all that he has to do to give effect to the gift and it is no longer open to him or his representatives to revoke the gift. Their Lordships also accept the position taken by the earlier cases that death of the donor does not put an end to the gift under those circumstances. The case is no authority to the position that death of the donor will not put an end to the gift if the donor dies before handing over the deed or that in those circumstances, the legal representatives could not refuse to register the gift. The well-known principle of law that courts will not lend their aid to perfect an imperfect gift is not intended to any extent to be departed from.

Adikesavalu Naidu *v.* **Gurunatha Chetty :** I. L. R. 40 M. 339. (F. B.)

The only question is how far this decision can stand in the face of the decision of the Privy Council in *Lachman Prasad* v. *Sarnam Singh* [1]. The view taken by their Lordships in that case seems to be that a sale or mortgage by a member of an undivided Hindu family does not of itself imply " a representation that he has power to charge the joint family property." It is difficult to reconcile the view of their Lordships with S. 55 Cl. (2) of the Transfer of Property Act or S. 66 Cl. (a). It is just possible that the implied representation that their Lordships negative is " that they had power to charge joint family property and *would make good the representation* by partition or otherwise," emphasis being laid on the underlined words or it may be that their Lordships take a view similar to the Chief Justice's in this case. The point is not clear.

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1. (1917) 33 M. L. J 39.

NOTES OF INDIAN CASES.

Deo Nandan Prashad v. Janki Singh: I. L. R. 44 C. 573 P. C.

This decision of their Lordships is of importance as giving the weight of their authority to more than one principle which hitherto has not been altogether beyond doubt. So far as it was held that as between a mortgagor and a usufructuary mortgagee, the latter cannot avail himself of a title acquired under a revenue sale, brought about by his own default, the decision only reaffirmed a well established rule. See Illustration (c) to S. 90 of the Trusts Act. But in applying the same principle as between the mortgagee and the co-sharers of the mortgagor, their Lordships were laying down a rule of mutual obligation stricter than was hitherto generally recognised. We are not quite sure that the case was regarded as covered in terms by the language of S. 90 of the Trusts Act. But the way in which the decree is framed by their Lordships, *viz.* by way of a declaration that the property purchased by the mortgagee must be held for the benefit of the original co-owners, suggests that they proceeded on the principle of that section. In *Doorga Singh* v. *Sheo Pershad Singh*, [1] there are two steps in the judgment in favour of the revenue sale purchaser *viz.* (1) that by the mere fact of being a co-sharer, a person is not disqualified from purchasing the property at a revenue sale for his own benefit; (2) That the fact of a co-sharer intentionally committing default in payment of his quota of the revenue does not in the absence of concealment or misrepresentation constitute fraud so as to disentitle the co-owner to the benefit of the purchase. The first of these is evidently not questioned by their Lordships, nor even the second step in a sense, but the assumption underlying the second step is held by them to be erroneous. They emphasise the need for "candid dealing and good faith" as between co-owners and lay down that fraud in the strict sense ought not to be the test. Reference is made in the course of the judgment to the default being 'intentional' or 'deliberate'. We are not quite sure as to what exactly this signifies: Is it necessary to prove that the default was made with the express object of purchasing at the revenue sale or, is the intentionality of the default to be inferred from the very fact of purchase at the subsequent sale? Again, is

1. (1889) I. L. R. 16 C. 194.

the law to be different, in case the defaulter is able to show that this omission to pay is due to negligence? We can scarcely believe that in insisting on a theory of good faith 'it was their Lordships' intention to place premium on negligence.

Another point arising on the observations in the Judgment relates to the position likely to arise when all or *more than one* among the Co-owners make default. If in such a case one of the Co-owners purchases at the revenue sale, the language of their Lordships rather suggests that those who have themselves been in default may well be held disentitled to any equitable relief. This is bound to lead to questions of nicety when some of the co-owners make default and only one, among those not in default, purchases at the revenue sale. Similar problems may arise when the person who seeks equitable relief is shown to have been in a position to avert the sale if he had chosen.

It is also noteworthy that in the particular case before their Lordships the mortgagee who made default and later on purchased at the revenue sale, was a minor acting through his agents. Their Lordships expressly hold him free from personal blame but add, that he cannot profit by his agent's deliberate default.

The Judgment of the High Court attempts a distinction for the present purpose between the co-owner and his mortgagee and suggests that the disability is clearer in the case of the latter, because it is said, "he is a trustee for a co-sharer and can derive no benefit for himself by committing a breach of trust. The property comes to him through a polluted channel and a Court of equity will not allow him to soil his hands by retaining any portion of the ill-gotten profits." We venture to doubt if in the face the judgment of the Privy Council, this distinction can be held good.

The observation in this case as to the duty of counsel to refer to authorities "adverse as well as favourable; " when a case is heard is *ex parte* has already formed the subject of some discussion in the pages of one of our contemporaries; but we are not sure if that dictum clearly implies the negative, when the argument is not *ex parte*. Is there sufficient basis in principle to justify a more favourable treatment of a party who does not choose to engage counsel, as compared with one who does engage counsel but it turns out, that the counsel so engaged is not aware of the authorities in his own favour ?

NOTES OF INDIAN CASES.

Shashi Bhusan Misra v. Jyoti Prasad Singh Deo: I. L. R. 44 C. 585 P. C.

It looks as if part of the reasoning of the Full Bench of the Madras High Court in *Secretary of State for India* v. *Srinivasachariar* [1] may require further consideration in the light of some of the observations of the Judicial Committee in this case. Apart from the evidence as to the conduct of the parties, the basis of the Madras decision was that, when making the grant, the grantor, who was the then Nawab of the Carnatic, had made no reservation in his favour and therefore it conveyed all that the grantor had in the soil including the right to the minerals. It may be noted in passing that Seshagiri Aiyar, J, who delivered the leading judgment, does not rest his conclusion on the enfranchisement, for, he expressly says that if the grant "was defective, I do not think that the enfranchisement would enlarge its scope." In this view it would not be correct to make enfranchisement proceedings analogous to the Permanent Settlement in the case of Zemindaries. Even as to the latter, its effect on the question of rights to minerals in Zemindaries was left open by the Privy Council in *Durga Prasad* v. *Brajonath*, [2] though in the present case it is stated that, "by the Permanent Settlement of 1793 all the mineral rights were confirmed to the Zemindars."

In dealing with the effect of the original grant, the Madras Full Bench distinguished the decision in *Hari Narayan Singh* v. *Shri Ram Chakravarthi* [3], as one, relating to a permanent lease. The later decision in *Doorga Prasad* v. *Brajonath* is not referred to in the Madras Case, but it may be possible to distinguish that case also, as relating to a service tenure. The present judgment of their Lordships is however impossible of any such distinction. The original grant was a Talabi Brahmottar Grant, which according to Wilson's definition (as corrected by the Judicial Committee) signifies, "land granted rent free (or at a fixed rent) to Brahmins for their support and that of their descendants etc." This almost exactly corresponds to our Shrotriem

1. (1916) I. L. R. 40 M. 268. 2. (1912) I. L. R. 39 C. 696,
3. (1910) I. L. R. 37 C. 723,

tenures: and it was found in the case that the tenure "is permanent and heritable and confers upon the holder for the time being full rights of alienation." Yet their Lordships say that these findings "though they invest the tenure with attributes of absolute ownerships afford little assistance in determining what it was that the grant passed." They apply the principle of the previous decisions to the present case as well and lay it down as a general rule that, "minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

Raghava Chariar v. Srinivasa Raghava Chariar: I. L. R. 40 M. 308, (F B.)

It is very much to be doubted if after all the learned discussion in this case we are very much nearer the solution of the general problem. What the Full Bench decides is that a mortgage created in favour of a minor for ready money advanced by him is valid until the minor on coming of age or his guardian choses to avoid it. Mr. Justice Srinivasa Aiyangar's judgment seems to treat the case as more or less exceptional. If in his view of the law property in the money did not even provisionally pass to the mortgagor he would have held that the mortgage was invalid. There is a point of view suggested by the Privy Council case in 38 All. 627 which might afford some help in the solution of the question. Their Lordships suggest there that a transfer purporting to be for consideration might be upheld on the footing of a transfer subject to a condition. Their Lordships observe "though it (the transfer) should be merely voluntary, Fatima Begum (the transferee) might no doubt, acting with full knowledge of her rights, deliberately select to take the benefits conferred upon her by it in lieu of the balance of her dower." The acceptance must, it may be, take place during the life-time of the transferor or it will be invalid. Till then or so long as repudiation does not take place the transfer is binding on the transferor and cannot be ignored. Repudiation of any responsibility under the sale deed may well be treated as repudiation of the transfer and the transferor may sue to recover the property. Where the consideration is provided by another or where the antecedent contract is validly entered into with a person not incompetent to contract, the sale or mortgage

would be wholly good. The same must be said of transfers in respect of what is called past consideration, validly passing from the minor. A charge as pointed out in *Khwaja Muhammad Khan* v. *Husain Begam* [1] can be validly created without there being an antecedent contract between the parties but this principle may fail where the mortgage document fixes a term for payment of the mortgage money. It would seem impossible for the minor mortgagee to take advantage of the charge, repudiating the term fixed. He should accept the benefit with the burden or reject both and fall back on his original rights If the minor should after coming of age elect to abide by the mortgage or sale, there is no reason why he should not be affected by all the consequences that would have enured if he were a major.

Murugesam Pillai v. Manicka Vasaga Desika Sambandha Pandara Sannadhi : I. L. R. 40 M. 402 P. C.

In this case the Board take care to say " that they do not wish to cast any doubt upon the proposition that in the case of mortgages granted over the security of an Adinam or mutt by the head thereof, it lies upon the mortgagee or those in his right. to prove that the debt was a necessary expense of the *institution* itself" as distinguished apparently from the expenses of the *head* however necessary. "But it is a circumstance" Their Lordships go on to say "of great weight when holder after holder of the headship of the mutt recognises and deals with the debt on that basis and as time goes on, this may itself come to be a most important element of probation upon the issue. With the lapse of time, the parties to the transaction may die and material evidence disappear and therefore where the debt has been recognised by successive holders of the office, the Court is much more easily satisfied that the debt was properly incurred than where the transaction is itself recent and can therefore be the subject of more exact evidence or where the transaction although remote has been the subject of challenge or dispute by those charged with the interests of the institution." In this case, the loan was for meeting the expenses of litigation, an object for which according to the ruling in *Prosanna Kumar Debya* v. *Golabchand* [2], temple property could be

1. (1910) I. L. R. 32 A. 410. 2. (1875) L. R. 2 I. A. 145.

alienated. The fact that one of the litigations in question was to repel hostile attacks against the title of the then *holder* to the office, and the other which was to establish the right of the mutt with reference to certain subordinate religious offices was only *partially* successful was not considered to affect the question. Whether they would have largely depended upon the circumstances, their Lordships do not seem to have been asked to consider if the peculiar position of the heads of mutt should not make a difference as to the extent of the liability of the corpus for litigation expenses. Their Lordships draw an inference against the defendants from the non-production of the account books of the mutt, their Lordships refer with disapproval to the practice in Indian procedure of those in possession of important documents lying by, trusting to the abstract doctrine of onus of proof and failing accordingly to furnish the best material for its decision." With regard to third parties "their Lordships say this" may be right enough; they have no responsibility for the conduct of the suit's but with regard to the parties to the suit it is, in their Lordship's opinion, an inversion of sound practice." Possibly their Lordships are referring here to cases of third party procedure provided for in R. 48-55, O. 16 of the Supreme Court Rules of Practice. We do not however have anything analogous to it in India. The point of distinction between this case and *Bilas Kunwar* v. *Desraj Ranjit Singh* [1], (not a third party case) where their Lordships refused to draw an adverse inference from the non-production of accounts is that whereas in this case, the accounts admittedly bore on the question in *Bilas Kunwar* v. *Desraj Ranjit Singh* [1], their relevancy was denied by the party in whose possession the accounts were.

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1. (1915) I. L. R. 37 All. 557 (P. C.)

NOTES OF INDIAN CASES.

Kalipada Sarkar *v.* Hari Mohan Dalal : I. L. R. 44 C. 627.

The question in this case related to one of those aspects of processual law which never come to be settled by any number of precedents. A decree for costs had been passed against the estate of a lunatic in a suit brought on his behalf by a next friend who it was found was herself a minor. The appeal arose out of an attempt to execute this decree, it being objected that the court was in the circumstances incompetent to pass a decree against the lunatic's estate. It was agreed on all hands that the lunatic was not properly represented. But the court held that an objection on this ground could not be raised in execution proceedings. The learned judges based this conclusion on certain observations of the Judicial Committee in *Rashid-un-nisa* v. *Muhammad* [1]. With all respect, we venture to doubt the correctness of the conclusion of the learned judges as well as their interpretation of the Judicial Committee's pronouncement in the case referred to.

It is no doubt true as a general proposition that an executing court must take the decree as it stands; but the distinction between a decree which is a nullity and one that has to be avoided, cannot altogether be lost sight of in the application of the above rule. It was expressly decided by the Privy Council in *Khiarajmal* v. *Daim* [2], that as against persons not properly represented on the record a decree "would be a nullity and might be disregarded without any proceeding to set it aside". But the view taken in the present case in effect compels such a person to resort to proceedings by way of a suit or review or appeal, etc. to prevent his property being seized and sold under colour of a decree which is in theory admitted to be a nullity. It may not always be easy to decide what matters will render a decree void within the meaning of the above rule, and it may be a question whether certain cases (cf. for instance, *Lakshmana* v. *Rengamma* [3] and *Raja of Vizianagaram* v. *Dantivada Chelliah* [4],) may not have gone too far in holding the decrees to be nullities in the particular cases. But it is a different matter when the objection relates to the execution of a decree, *ex hypothesi*, void. It is true that in *Radha Prasad* v. *Lal Saheb* [5], *Khiaraj Mal* v. *Daim* [2] and *Rashid-un-nisa* v.

1. (1909) I. L R. 31 A. 572. 2. (1904) I. L. R. 32 C. 296 at p. 312.
3. (1902) I L. R. 26 M. 31. 4. (1904) I. L. R. 28 M. 84
5. (1890) I. L. R. 13 A. 53.

Muhamad [1], the proceedings came up by way of regular suit. But that would only show that a suit for a declaration of the nullity of the decree or other proceedings in question, was *competent*, not, that it was obligatory: in fact the second of the cases decided that it was not obligatory. We do not quite follow the learned judges in the reliance placed by them on the circumstance that in the first and second of the above cases no objection of a bar under S. 244, Civil Procedure Code, was raised; for, as was held in the third case, such an objection would have been untenable. But it does not necessarily follow from this that the objection to the execution *cannot* be raised in the course of execution. This is where it seems to us, the learned Judges have misinterpreted the basis of the Privy Council rulings. If the sale held on the basis of the decree, would be null and void, what is there in reason to compel the court to go through the farce of a sale even when that circumstance is brought to its notice? *Gomathain* v. *Komandur* [2], referred to in the judgment has obviously no bearing on the present question, as that case proceeded expressly on the footing that the decree was not a nullity.

Venkataratnam *v.* **Sri Raja Varadarajah Appa Rao**: I. L. R. 40 M. 529 F. B.

In this case the Full Bench had to construe a particularly obscure section in the Estates Land Act, an Act by no means famous for clear drafting. Under S. 3 cl. 7 (1) of that Act, old waste means and includes land in an estate which not being private land, has at the time of letting by the landholder been owned and possessed by him or his predecessors in title for a continuous period of not less than ten years and has continuously remained uncultivated during the time, such period being either after or partly before and partly after the passing of the Act or within 20 years before the passing of the Act. The question was whether the ten years' period was to be immediately prior to the letting in question or whether some other letting might intervene. The Full Bench had not to consider the question whether there might be different lettings within the meaning of the section although the tenant and the land are identical if there are separate leases for different terms or with different terms or conditions or whether the letting would

1. (1909) I. L. R. 31 A. 572. 2. (1903) I. L. R. 27 M. 118,

be different only if the tenant is different. Oldfield and Tyabji, JJ. held that the ten years need not immediately precede the letting. A ten year old waste land after 1883, became an old waste irrespective of the condition of the land thereafter. The Full Bench disagree with them and hold that the letting referred to is not the first letting after that event, but the letting which comes in question. Either view presents difficulties and neither can be said to have the merit of making the two sub-clauses mutually exclusive, but on the whole we think the Full Bench view is the preferable one. On the construction given to the section by the Division Bench, the two clauses could very well have been put in one clause worded as the second, but omitting, the words "after the passing of the Act" and with a proviso that "in cases where this period of 10 years is wholly or partly before the passing of this Act, the land was after 1888, for a period of 10 years owned and possessed &c. and continuously remained uncultivated." The general theory of the Act that a Zamindari tenant is an occupancy tenant, unless the contrary has been finally declared by a court of competent jurisdiction, the enacting of a separate clause for such cases and having two clauses instead of one as noted above, would seem to be sound considerations in support of the Full Bench view.

Venkayamma v. **Narsamma** : I. L. R. 40 M. 540.

Where a will gives a life estate to the widow and the remainder to a grandson alive at the date of the will and other children of the daughter that might thereafter be born, when is the disposition in favour of the grand children to be said to "come into operation" within the meaning of Madras Hindu Transfers and Bequests Act. Their Lordships in this case take those words to mean "fall into possession". It is possible to take these words as being equivalent to "become vested." But the fact that the coming into operation is of the *disposition* and not of the will, would seem however to be a strong circumstance the other way. And then there is the proviso which saves the rights of bona-fide transferees for consideration from persons in whom the property is vested prior to the Act which seems also to be an equally conclusive indication in favour of the construction adopted.

Radhakrishna Mudaliar *v.* **Subraya Mudaliar**: I. L. R. 40 M. 550.

Under the General Clauses Act, signature includes *mark* where the executant is illiterate, but the provisions of that Act do not apply to the Succession Act and the section itself makes a difference between a mark and a signature. It is the accepted rule that a man's signature affixed by another in his presence under his direction is quite as good as his own signature (see *Sasi Bhushan Pal* v. *Chandra Peshkar* [1], *Deo Narain Rai* v. *Kukur Bind* [2], *Shamboti Koeri* v, *Jago Bibi* [3]). The section recognises this as to signature but provides separately for it. *Expressio unius, est exclusio* alterius, it is possible that the same liberty is not intended to be taken as to marking or could it not be that the precaution as to attestation by independent persons was not considered necessary in the case of a mark. The tendency of the highest tribunal is towards a strict rather than a liberal construction.

Narayanan *v.* **Veerappa**: I. L. R. 40 M. 581.

A discharge in the place that the debt is incurred and is presumably payable must operate as a discharge of the debt and the only question is whether a discharge of the father discharges the son as well. The pious obligation proper of the son seems to arise only on the death of the father; till then it is a sort of subsidiary obligation. If a decree against the father is barred, the creditor can't sue the son on the judgment relying upon Art. 120 which ordinarily governs such action. Nor can a suit be maintained against the son independently of the father. The liability during the father's life time is according to the latest pronouncement of the Privy Council (as interpreted by a Bench of the Madras High Court) only a liability to pay if the father is unable out of his share to meet the demand. When the debt is discharged as against the father by operation of law, there is nothing for the son to be liable for.

Chidambaram Chettiar *v.* **Aiyasami Thevan**: I. L. R. 41 M. 585.

A promissory note payable to a person or order or bearer offends the statute prohibiting bearer pronotes, but that statute in no way prohibits notes from becoming payable to bearer after an endorsement, which is the effect of all blank endorsements.

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1. (1906) I. L. R. 33 C. 861. 2. (1902) I. L. R. 24 A. 319.
3. (1902) I. L. R. 29 C. 749.

NOTES OF INDIAN CASES.

Appavu Rowther *v.* Seeni Rowther: 33 M. L. J. 177.

The precise question raised in this case does not appear to have been the subject of prior Judicial discussion in this country and we are not quite sure as to the correctness of the decision.

The parties agreed to refer their disputes to certain arbitrators. For some time, nothing further was done and one of the parties then sent a notice revoking the arbitration and filed a suit to enforce his rights ignoring the reference. Pending the suit, the arbitrators gave their award and the court on the application of the defendant passed a decree in terms of the award. The original plaintiff appealed and it was argued on his behalf that on the mere filing of the plaint, the arbitrators became *functus officio,* that their award was consequently *ultra vires* and void and that the court acted without jurisdiction in passing a decree in terms of the award. This contention was upheld and the decree was set aside.

The exact grounds on which the decision is rested are not quite clear. Though in the statement of the facts, a reference is made to the notice sent by one of the parties to the arbitrators, it does not appear that the judgment of their lordships proceeds nor can it proceed, upon the footing that the authority of the arbitrators was *revoked* by the notice for it is well established, so far at any rate as the Indian law is concerned, that a submission cannot be revoked except for good cause and none such was alleged here. See *Pistonji* v. *Manokji* 1. *Perumalla* v. *Perumalla* 2. The Judgment contains a resume of the legislative provisions on the question as a result whereof, according to the learned judges, the Indian law on this subject has been brought into conformity with the English law. But neither under the English Common law nor under the Arbitration Act, 1888, is there anything to suggest that the authority of an arbitrator is extinguished by the mere fact of action brought in a court of law on the same subject-matter. Under the Common Law a submission seems to have been revocable at will; and a contract to refer, could not be enforced directly or indirectly but only gave rise to a claim for damages on breach. Under the Arbitration Act, 1889, it is competent for the courts to stay the trial of the suit in question and this if anything, goes only to recognise a subsisting jurisdiction in

1. 12 M. I. A. 112. 2. I. L. R. 27 M. 112.

the arbitrator. Reference is made to the decision in *Doleman & Sons* v. *Osset Corporation* [1] but that does not seem to support the general proposition as laid down in the case under notice.

Taking up first the law in India. S. 22 of the 2nd Schedule to the new Code of Civil Procedure repeals the last 37 words of Sec. 21 of the Specific Relief Act with the result that a plea of a contract to refer or even an actual reference to arbitration is no *bar* to a suit on the same subject-matter.

This only means that Courts have got undoubted and unquestionable jurisdiction to decide the matters in controversy; but that of itself, is hardly enough to deprive the arbitrator to whom the parties have contractually given authority to settle their disputes of the jurisdiction that has been legally vested in him by common consent. The learned judges invoke what they seem to regard as paramount doctrine that a tribunal constituted by the parties should not come in conflict with or usurp the functions of the tribunals which the Sovereign has provided.

Whatever may be the exact scope or limitations of that doctrine it is clear that in the case of arbitration agreements, both legislature and Judges have directed their attempts in one form or another towards enabling parties to reap effectively the benefits of such contracts. That there have been concurrent proceedings is amply illustrated by the case of *Lower* v. *Kermodi*[2] where it was held that an award can be pleaded pending an action *puis darrein continuance.* Nor are there, in this case, the precise facts that existed in *Doleman and Sons* v. *Osset Corporation*[1] and which led Fletcher Moulton, L. J., to think that the practical consequence of upholding the award, under the circumstances, would be tantamount to ousting the jurisdiction of the court. That case turned upon the construction of S. 4 of the Arbitration Act. The defendant had either abstained from applying for stay of suit or the stay had been refused. In such circumstances it was considered that by the refusal to stay, the court must be presumed to have taken sole and exclusive decision of the dispute and to have made the arbitrator *functus officio* from then and consequently if the arbitrator insisted upon passing the award, he would only be usurping the functions of the court. In the case under notice this aspect of the question did not arise. The principle of the court being called upon to pass a decree in

1. (1912) L. R. 3 K. B. 257. 2. 8 Taunt. 147.

terms of an award rests on the footing of an accord and satisfaction. The Court in so doing is exercising its admitted jurisdiction there is no derogation from it. Why then should there be any difference between an award passed before suit and one passed later, so that the former alone can constitute a substituted right for the original cause of action but not the later? An arbitrator's authority is one derived from the consent of the parties and as long as it is not open to any of them to revoke that authority by withdrawing his consent, except for good cause, it continues to subsist. Nor can the refusal of the Judge in Chambers to grant a stay of the action operate as a revocation of the agreement as between the parties. It follows, therefore, that irrespective of the court's exercising the discretion given to it under S. 18 of the 2nd Schedule, the arbitrator is competent to go on with his proceedings.

Their Lordships say, however, that the court may, in a given case, ask the arbitrator to give his award if it considers that he will decide the dispute better. But how can the court invest the arbitrator whose jurisdiction is *ex hypothesi*, taken away, with competency to decide the suit unless the parties agree *de novo* that the action itself be referred? An arbitrator has no coercive jurisdiction, unlike the King's Courts. It would be unmeaning to say that as soon as an order for stay is granted under S. 18 of the 2nd Schedule, the parties may be said to have agreed to the reference for, *ex hypothesi*, the plaintiff does not, as a matter of fact, assent to it. Under the circumstances, it seems to us with all respect, that to hold that the arbitrators become *functus officio* on the mere filing of the plaint is calculated to frustrate the obvious intent with which S. 18 of the 2nd Schedule is enacted and is not warranted by principle or authority.

Reverting to the case of *Doleman & Sons* v. *Osset Corporation* [1] it is submitted that that decision does not really touch the question at issue. There, the facts disclosed simply an arbitration clause, a mere agreement to refer as distinguished from an actual submission—a difference that is expressly referred to in the judgment of Fletcher Moulton, L. J. The answer given by his Lordship to the argument that a submission cannot be revoked at the mere will of the parties, and that the learned Lord Justice's conclusion would be inconsistent with the provision contained in

1. (1912) 3 K. B. 257.

S. 1. of the Arbitration Act is significant. He says that it is only to actual submissions that the prohibition against revocation applies, but as for agreements to refer, they could be revoked as well as any other binding contract, giving only a claim for damages to the disappointed party. In fact, he puts aside the question arising in the present case, *viz.*, what is the effect of the institution of an action after the parties have passed into the stage of a *de facto* reference, pending at the time of suit. The reasoning of Vaughan Williams, L J., is clearly against the theory of the cessation of jurisdiction on the part of the arbitrators.

The decision of the Madras High Court practically enables a party to render futile all the proceedings of an arbitrator, if he has reason to apprehend an unfavourable decision at his hands He has only to rush into court and file a suit with respect to the dispute, just before the arbitrator begins to write his award. We hope the question will be more fully examined at an early date.

P. R. NARASIMHA IYER,

High Court Vakil.

Gauranga Sahu *v.* Sudevi Meta : I. L. R. 40 M. 612.

The following passage from Maha Nirvana Tantra cited in *Bhupathinath Smriti Tirtha* v. *Ram Lal Maitra* [1], seems to support the founder's right to manage the trust. " The giver is competent to take care of the wealth or property endowed for religious purposes. Let the owner himself or his representative appropriate to pious purposes the corpus of a property or its income according as it may have been resolved." The right of the king to prescribe rules for the protection of temples is recognised in the following text of the Mitakshara यो धर्मे गोप्रचारोदकसदेवगृहपालनादिरूप : सोपि यत्नेन पालनीय: (The rules prescribed by the king for the regulation of pasture, and for protection of irrigation, and of temples should be obeyed with effort) and his right to enforce the trust in the following text : " If a gift be promised by a person whether in health or in sickness and for a religious purpose and he dies without making it, his son should be compelled to make it." See *Bhupathinath Smriti Tirtha* v. *Ram Lal Maitra* [1]. There seems

1. (1909) I L. R. 37 C. 128 p 155.

to be no authority for the position taken in this case as well as some other cases relied upon, that the founder and his heirs are entitled to nominate a trustee to manage the trust when the originally appointed trustee dies. No doubt in *Ramanathan Chetty* v. *Murugappa Chetty* [1] their Lordships recognise the power of the founder's heirs to settle a scheme of management by them but that does not go sufficiently far to support the judgment in this case. We prefer the conclusion of the dissenting Judge Mr. Justice Srinivasa Iyengar.

Palaniappa Chetty *v.* **Srimath Devasikhamani Pandara Sannidhi:** I. L. R. 40 M. 709 (P.C.)

In this case, the question was whether the grant of a temple land in perpetuity in consideration of a premium was valid and binding against the charity. The grant was in favour of another charity. Some point was apparently made out of this fact. This is how their Lordships refer to it "the charity contemplated was the erection of a kind of rest-house for pilgrims passing through the village, irrespective of the consideration from whence they came or where they were proceeding and equally irrespective of whether or not they were worshipped in the temple or desired so to do or contributed in any way to its maintenance. It was therefore a charity not in any sense subsidiary to or connected with the temple or the religious services performed therein but was an entirely separate and independent charity of a wholly different kind and character, to the support or maintenance of which none of the dedicated property or its produce could as an act of charity be legitimately applied." If the charity was subsidiary to the main charity, for instance, if it was a rest-house for pilgrims coming to the temple instead of for pilgrims or wayfarers generally the conclusion might have been different. In the Madras High Court Mr. Justice Subrahmania Iyer was for a somewhat strict construction of the powers of a trustee *Vidyapuram* v. *Vidya Nidhi* [2] while a more liberal view has been taken in some of the later cases. Although it cannot be said that their Lordships lay down any proposition in particular, it may safely be said that the trend of their Lordships' observations is towards a stricter interpretation of the terms "benefit" and

1 (1906) I. L. R. 29 M. 283. 2. (1904) I. L. R. 27 M. 465.

"necessity." Their Lordships start by saying "if for instance, the worship of the idol be intended to be perpetual, as it could hardly fail to be, then the preservation and use of the dedicated property to support and maintain the worship must, they think, be similarly intended to be perpetual. A rule, therefore, which would authorise and empower the shebait of such a temple arbitrarily at his own mere will and pleasure to alienate the dedicated property either bit by bit or *en bloc* would be so repugnant to the whole purpose and object of the endowment that it could not in their view, be rationally held to embody the intention of the original endower." Their Lordships then refer to the contention of Mr. DeGruyther that the shebait stands in a relation similar to that of a guardian towards the infant and that he has power and authority to alienate lands in case of necessity or benefit to the estate. Their Lordships then extract a passage from the judgment of Sir Montague Smith which says that under the Hindu Law, property for the maintenance of religious worship is inalienable. They finally state that the only specific point actually decided in the three authorities, viz., *Hunooman Persaud Pandy* v. *Baboo Munraj Koonwaree* [1], *Prusonnokumari Debya* v. *Golal Chand Baboo* [2], and *Konwar Doorganath Roy* v. *Ram Chunder Sen* [3], is that a debutter estate can be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. They say it is difficult to give a precise definition of what benefit is but that "preservation of the estate from extinction, the defence against hostile litigation affecting it, the protection of it or portions of it from injury or deterioration by inundation and such like things would be benefits." Their Lordships are clear that converting land into cash for the purpose of investing it to bring in a larger income could not under any circumstances be proper. Their Lordships consider the question as to whether any attempt was made to secure a variable rent. The premium was not required for any of the purposes of the charity. Though the grant of the cowle may have been an easyway of getting the nuisance on the land abated, their Lordships held "the grant was not dictated by any necessity nor did any benefit accrue to the charity." In the absence of unavoidable necessity, their Lordships hold that a grant of land in perpetuity whether for premium or for a fixed rent is bad. As to the plea of local usage justifying the alien-

1. 6 M. I. A. 393 2. (1875) L. R. 2 I. A. 145
3. (1876) I. L. R 2 C. 341.

ation their Lordships say that such a usage would be one modifying the law and would not be established by evidence that for a long time permanent leases of temple lands are granted. The question also arose whether a *custom* is a question of law or fact. On this their Lordships say "questions of the existence of ancient custom are generally questions of mixed law and fact; the Judge first finding what were the things actually done in alleged pursuance of custom and then determining whether these facts so found satisfy the requirements of law. The latter is a question of law—not fact." This pronouncement of their Lordships would not be conclusive on the question whether the question of custom is open in second appeal in both the aspects as that would depend on the power of the High Court under S. 100 and not upon any abstract consideration of what is a question of law or fact. The Judges that decided *Kakarla Abbayya* v. *Raja Venkata Papaya Row* [1] were not unaware of the distinction between the two aspects but decided that the question in both the aspects was open on a consideration of S. 584 of the Civil Procedure Code.

Arunachella Ambalan *v.* Orr . I. L. R. 40 M. 722.

The point of limitation that arose in the case, viz., whether Sec. 22 or the Limitation Act of 1877 applied to the case of substitution of a party for another by reason of the assignment of the latter's interest is concluded by the decision of the Privy Council in *Mayappa Chetty* v. *Subramania Chetty* [2]. The section has no application to cases in which as their Lordships say, " The action is originally properly constituted as to parties but has become defective because there has been a change or devolution of interest. "

Shanmuga Nath Chettiar *v.* Srinivasa Aiyar: I. L. R. 40 M. 727.

The point in this case is covered by the decision of the Privy Council in *Karmali Abdulla* v. *Karimji Jivaji* [3]. Whether an endorsee of the pronote can maintain the action against the co-partners is, of course, another question. In the case of a note executed by the managing member of a Hindu family it has

1. (1909) I. L. R. 29 M. 24. 2. (1916) L R. 43 I. A. 113.
3. (1915) I. L. R. 39 B. 26 (P. C.)

been held by a Bench that the endorsee can sue, *Nataraja Naicker* v. *Ayyasami Pillai* [1] though another Bench had previously taken a different view in *T. Seetharama Chetty* v. *P. Seshayya Chetty* [2]. If the liability of the other members, or of the partners is on the note, no doubt that conclusion would be sound. It would be otherwise if the liability is to be held to be on the debt unless the delivery of the note is regarded as an equitable assignment of the debt as well. Even on the question as to whether equitable assignments of pronote debts can be recognised there is a conflict. These aspects have a bearing on the question of the liability of the other partners, but it must, at the same time, bo observed that the case of a partner is not quite analogous to the case of a member of the Hindu family.

Basivi Reddi *v.* **Ramayya**: I. L. R. 40 M 733

This case follows *Kunhiamma* v. *Kunhunni* [3], but that case has been overruled by the Full Bench in *Krishnam Soorya* v. *Pathma Bee* [4], which apparently was not brought to their Lordships' notice. A suit for possession was held by the Privy Council to be included in the expression, "suit to set aside an adoption." The Privy Council regards a suit under S. 283 as a suit to set aside or alter an order of the Court. It may no doubt very fairly be argued that in view of the decisions of the Privy Council that the suit as framed in this case was a case governed by Art. 11. The question still remains as to how this conclusion is to be reconciled with the decision of the Full Bench in *Krishnam Soorya* v. *Pathma Bee* [2]. As no further relief can be got if the order in claim proceedings is not got rid of any action for further relief would be barred if the action for setting aside the order is barred but the question in this case was not that. Here further relief was barred under some other article while the claim for setting aside the order was not barred. The view taken in this case is that Art. 11 applied wholly to the case a conclusion at variance with the Full Bench judgment above referred to. A conclusion not at variance with the Full Bench decision would have been that neither art. 11 nor art. 29 would apply to a claim for further reliefs in a case like the present.

[*End of Vol. XXXIII.*]

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1. (1917) 32 M. L. J. 354.
2. (1912) M W N. 230.
3. (1892) I. L. R. 16 M. 140.
4. (1905) I L. R 29 M. 151,

NOTES OF RECENT CASES.

Ayling and Sadasiva Aiyar, JJ. 1917, July 17. — Cr. R. C. No. 99 of 1917.

Cr. P. C., S. 332—Assessor—Non-attendance—Proceedings against assessor under S. 332—Nature of—Witness examined in course thereof—Order against, under S. 476, Cr. P. C.—Jurisdiction.

Proceedings taken by a Court under S. 332 of the Code of Criminal Procedure against an assessor for non-attendance are judicial proceedings and it has jurisdiction to take action under S. 476 of the Code of Criminal Procedure against a person examined as a witness in the course of such proceedings.

K. S. Jayarama Aiyar for Petitioner.

Public Prosecutor Contra.

Sadasiva Aiyar and Spencer, JJ. 1917, July 18. — S. A. No. 73 of 1916.

Hindu Law—Joint family—Will by manager appointing stranger as executor—Pro-note by executor as such—Suit on—Decree if can be given against shares of surviving members of family.

Where A, a member of a joint Hindu family consisting of himself and his minor sons and minor nephew, executed a will appointing one V, a stranger, an executor and authorised him to sell family properties in case of pressure from the creditors of the estate, and, purporting to act as executor, V executed a promissory note for a debt due by the estate, *held,* in a suit on the note against V and the surviving minor members of the family, that the creditor must be deemed to have looked only to the personal security of V and that the interests of the minors in the family property were not liable.

C. Krishnamachariar for Appellant

C. V. Anantakrishna Aiyar for Respondents.

Abdur Rahim and Kumaraswami Sastriar, JJ. 1917, July 20. — C. M. S. A. No. 77 of 1916.

Limitation Act, Art. 182—Final decree—Application to execute—What is—Application for restitution under S. 144, C. P. Code, to work out legal consequences of such decree.

An application for restitution under S. 144, C. P. C., to work out the legal consequences of a final decree is an application for the execution of such decree within the meaning of Art. 182 of the Limitation Act.

K. S. Ganesaiyar, for Appellant.

K. V. Krishnaswami Aiyar, for Respondent.

Spencer and Seshagiri Aiyar, JJ. 1917, July 23. — S. A. No. 1868 of 1915.

Second Appeal—New evidence in—Admission of—High Court—Jurisdiction—Transfer of Property Act, S. 53—Fraudulent transfer — What is — Transfer partially supported by consideration—Effect.

The High Court has jurisdiction in Second Appeal to admit new evidence.

The fact that a transaction impeached under S. 53 of the Transfer of Property Act is partially supported by consideration is not enough to take it out of the rule enacted by that section.

V. Venkatachariar for Appellant.

A. Ramachandra Aiyar for Respondent.

The Chief Justice, Oldfield and Kumaraswami Sastriar, JJ., 1917, July 26. — S. A. No. 275 of 1915.

H. Law, widow—Adoption in pursuance of husband's authority—Alienation before adoption for purposes not binding on inheritance—Right of adopted son to set aside alienation and to recover property during widow's lifetime.

Where a sonless Hindu widow authorised by her husband to adopt, alienates property of her husband for purposes not binding upon the inheritance and then makes an adoption in pursuance of the authority, the adopted son can even during the lifetime of the widow, set aside the alienation and recover the property so alienated.

26 M. 143 over-ruled.

T. R. Ramachandraiyar for Appellant.

K. S. Ganesaiyar for Respondent.

NOTES OF RECENT CASES.

Spencer and
Seshagiri Aiyar, JJ.
1917, July 31.

S. A. No. 1283 of 1916.

C. P. C., S. 114—Review—Jurisdiction—Appeal—Order dismissing, for failure to furnish security for costs—Review—"Sufficient cause"—What is.

The Court has jurisdiction to review an order dismissing an appeal for failure to furnish security for costs a cause to be 'sufficient' within the meaning of S. 114, C. P. C. must have been in existence at the time the order sought to be reviewed was passed.

T. V. Muthukrishnaiyar for Appellants.
N. Rajagopalachariar & A. Swaminathaiyar for Respondents.

Spencer and
Seshagiri Aiyar, JJ.
1917, August 1.

S. A. No. 7 of 1916.

Mortgage—Contribution—Sale by the widow of one of the mortgagors—Suit by daughter to recover property—Condition of payment of mortgage money.

A and B together made a mortgage each of his 3 acres. The appellant purchased the entire 6 acres from A and B's widow. The suit was brought by B's daughter to recover possession of B's 3 acres. *Held,* she was bound to pay on the principle of contribution ½ of the debt due under the mortgage by A and B as a condition of the recovery of the lands; the sum was made a charge thereon with interest at the mortgage rate.

A. Krishnaswami Aiyar for the Appellants.
K. V. Krishnaswami Aiyar for the Respondents.

Spencer and
Krishnan, JJ.
1917, August 6.

S. A. No. 601 of 1916.

C. P. C., O. 21, R. 63—Attachment before judgment—Petition objecting to—Order rejecting—Suit to set aside—Maintainability.

O. 21, R. 63 of the Code of Civil Procedure applies to cases of attachment before judgment and a suit can be brought to set aside an order dismissing a petition objecting to an attachment before judgment.

S. Muthia Mudaliar for Appellant.
P. V. Parameswara Aiyar for Respondent.

Bakewell and Phillips, JJ.
1917, August 7.
S. A. No. 5 of 1916.

Registration Act, S. 17, cl. (vi)—Order of Court—Registration—Necessity—Compromise not relating to subject-matter of suit—Compromise sanctioned by Court on behalf of minor parties—Admissibility in evidence without registration.

A compromise dealing with property which is not the subject-matter of suit is admissible in evidence without registration in a case in which the compromise is brought to the notice of the Court and is sanctioned by it as being beneficial to the minors who are parties to the suit.

T. V. Muthukrishnaiyar for Appellant.

C. Narasimha Chariar for Respondent.

Bakewell and Phillips, JJ.
1917, August 7.
S. A. Nos. 1788 to 1798 of 1916.

Estates Land Act—Village surveyed before 1859—Proper rate—Presumption—Mittadar's right to revert to faisal rate—Collection by predecessor of lower Jamabandi rates—Effect—Decision against mittadar's right to revert to faisal rates if and when res judicata *against his successor—S. 26 (3)—Effect.*

The faisal rate must be presumed to be the proper rate in villages which were surveyed before 1859.

A mittadar is entitled to revert to the faisal rates mentioned in the muchilikas along with the rates actually paid called the Jamabandi rates, although his predecessor had collected the lower Jamabandi rates for over 25 years.

A decision against a mittadar that he is not entitled to revert to the faisal rates in the face of payments of the Jamabandi rates for a series of years when there is no allegation that the Jamabandi rates have ceased to be binding is not *res judicata* against his successor inasmuch as the latter claims the faisal rates in his own right recognised by S. 26 (3) of the Estates Land Act and does not claim them through his successor.

C. Narasimha Chariar (A. Krishnaswami Aiyar with him) for Appellants.

The Hon. The Advocate-General and *S. Desikachariar* for Respondents.

CWC

NOTES OF RECENT CASES.

Abdur Rahim and Bakewell, JJ. 1917, August 9. — C. M. A. No. 68 of 1917.

Insolvency under Provincial Insolvency Act—Sale by Official Receiver—Purchasers' right to apply for possession—C. P. C., O. 21, R. 97—Applicability—Remedy of purchaser.

A purchaser from a Receiver in insolvency under the provincial Insolvency Act is not entitled to apply to be put in possession of properties purchased by him under S. 47 of the Act read with O. 21, R. 97 of the Code of Civil Procedure. O. 21 has no application to such a case. The purchaser's only remedy is to file a suit for possession.

B. Narasimha Rao for Appellant.

M. Narasimham for Respondent.

Spencer and Seshagiri Aiyar, JJ. 1917, August 14. — S. A. Nos. 275, 276 of 1917.

*C. P. C., S. 11—Co-defendants—*Res judicata *between—Mortgage—Suit for sale—Mortgagor and person claiming title to mortgagor made parties Defendants—Question of title decided between—Fresh suit between them in respect of same property—Maintainability.*

Where in a suit for sale on a mortgage to which the mortgagor and a person claiming the mortgaged property adversely to the mortgagor were parties, an issue was raised as to the title to the suit property and decided in favour of the mortgagor, *held* that the decision did not operate as a bar to the trial of the same question in a fresh suit between the mortgagor and the party claiming the property adversely to him

L. A. Govindaraghavaiyar, K. Jagannatha Aiyar and *S. Subramania Aiyar* for Appellants.

M. S. Venkatarama Aiyar for *V. Viswanatha Sastri* for Respondent.

Spencer and Krishnan, JJ. 1917, August 23. — S. A. No. 960 of 1916.

Mortgage with possession—Suit for redemption—Mortgagee if entitled to set up barred simple mortgages held by him in respect of same property.

In a suit for redemption of a usufructuary mortgage it is not open to the mortgagee to set up two barred simple mortgages held by him in respect of the same property.

B. Sitarama Rao for Appellant.

K. Ramanatha Shenai and *K. Y. Adiga* for Respondents.

Ayling and Seshagiri Aiyar, JJ. *1917, August 23.* — A. S. No. 359 of 1915.

Limitation Act, S. 12—Appeal—Limitation—Computation—Deduction of period taken up in obtaining copies—Copies ready during vacation—Copies taken delivery of on date next after day of re-opening of Court after vacation.

Where it appeared that in a case in which certified copies of the decree and judgment were ready during the vacation, the copies were taken delivery of not on the date on which the Court reopened but on the next day, *held* that, in computing the period of limitation for the appeal, the appellant was not entitled to a deduction of the period of the vacation.

Barton (Instructed by *King and Partridge*) for Appellant.

K. Raja Aiyar for Respondents.

Chief Justice and Kumaraswami Sastri, J. *1917, August 23.* — A. S. No. 28 of 1916.

Limitation Act, Arts. 57, 60 and 115—Applicability—Nattukottai Chetty—Deposit in his Vilasam.

Where stridhanam money of the wife of a Nattukottai Chetti was deposited with another Chetti firm in the *Vilasam* of her husband at two months' Rangoon thavanai interest, *held*, in a suit for the recovery of the amount, that the transaction was a "deposit" within the meaning of Art. 60 of the Limitation Act but that its applicability to the suit depended upon the meaning to be attached to the term "thavanai." *Held* that Art. 60 would apply to the suit if the amount was payable on demand while Art. 115 would apply if it was payable only on demand after the expiry of the current thavanai and that Art. 57 was not at all applicable to the case.

C. S. Venkatachariar for Appellants.

T. R. Venkatarama Sastriar, S. Ramaswami Aiyangar and *V. Ramaswami Aiyangar* for Respondent.

NOTES OF RECENT CASES.

Abdur Rahim and Bakewell, JJ.
1917, August 24.
C. M. S. A. No. 132 of 1916 and L. P. A. Nos. 226, 277 of 1916.

Transfer of Property Act, S. 43—Applicability—Service Inam—Alienation—Enfranchisement before alienation and inam title-deed issued prior to it—Notification of enfranchisement subsequent to alienation—Effect—Civil Procedure Code, S. 47 "Party to suit," Exonerated party, if a.

In the above cases their Lordships referred to the Full Bench the questions (1) whether S. 43 of the Transfer of Property Act was applicable to the case of an alienation of a service inam which at the time of the alienation had been enfranchised and for which an inam title-deed had been issued to the service-holder, the requisite notification under S. 17 of the Madras Act II of 1894 being however made only subsequent to the alienation, (2) whether a person who was originally made a party to a suit but is subsequently exonerated is a party to the suit within the meaning of S. 47, C. P. C.

Hon. B. N. Sarma (K. Aravamudhu Aiyangar with him) for Appellant.

C. Rama Rao for Respondents.

Sadasiva Aiyar and Phillips, JJ.
1917, August 24.
S. A. No. 278 of 1916.

H. Law—Joint Family—Coparcener—Funeral ceremonies of, incurred by one of the members only—Claim to contribution as against other members—Suit to enforce—Limitation—Starting point—Partition between members of family more than 3 years after date of funerals—Funeral expenses if can be credited to share of member who spent.

A member of a Joint Hindu family who has spent money for performing the funeral ceremonies of a deceased coparcener has three years within which to claim contribution from the other members, the starting point of limitation for a suit for the purpose being the date on which the expenses were incurred. He

cannot, at a partition between himself and the other members effected more than three years after the date on which the expenses were incurred, claim to be credited with the amount payable by the other members as and for their share of the expenses so incurred.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Aiyar* for Appellant.

C. Madhavan Nair for Respondents.

Chief Justice and Kumaraswami Sastriar, J. *1917, August 28.* — A. S. No. 114 of 1916.

Trust—Suit on behalf of—Parties— Suit by one of trustees only—Other trustees not parties at all—Maintainability.

It is settled law in India that a suit on behalf of a trust brought by one of the trustees alone, the other trustees not being parties at all, is not maintainable.

24 I. C. 806 followed.

Advocate-General K. Srinivasaiyangar, T. V. Gopalaswami Mudaliar and *A. Ganeshaiyar* for Appellants.

T. R. Ramachandraiyar and *S. Muthiah Mudaliar* for Respondents.

Sadasiva Aiyar and Phillips, JJ. *1917, August 28.* — S. A. No. 389 of 1916.

Decree—Payment out of Court—Failure of decree-holder to certify the payment—Transfer of decree to person taking with notice of uncertified payment—Levy of execution by transferee-Decree-holder and realisation of decree amount from judgment-debtor—Judgment-debtor's suit against decree-holder and his transferee for damages for fraudulent levy of execution—Maintainability against transferee—Limitation—Starting point.

Where the holder of a money decree to whom payment of the decree amount had been made out of Court but who omitted to certify the payment as per his agreement with the judgment-debtor transferred the decree to a person who took the transfer with notice of the uncertified payment but nevertheless

realised the decree amount from the judgment-debtor, held, in a suit brought by the latter against the original decree-holder and his assignee for the recovery of damages caused to him (the judgment-debtor) by the fraudulent levy of execution, by Phillips, J. (Sadasivaiyar, J., dissenting) that the judgment-debtor had a cause of action as against the assignee decree-holder.

Held by Sadasivaiyar, J., (Phillips, J., not expressing any opinion) that the starting point of limitation for such a suit was the date on which the decree-holder failed to certify the payment.

T. R. Venkatarama Sastriar for Appellant.

K. Jagannathaiyar and S. Subramaniyaiyar for Respondents.

Sir John Wallis, C. J.,
Kumaraswami Sastri, J.
1917, August 28.
S. A. No. 339 of 1916.

Hindu Law—Mitakshara—Debts of father—Liability of the sons during his life-time—Pronote executed by the father after partition in renewal of a note executed before partition—Liability of the sons for.

The decision of the Privy Council in *Sahu Ramchandra v. Bhup Singh.* 33 M. L. J. 14 does not lay down that there is no pious obligation on the son for the debts of his father during his father's life-time.

In a suit on a pronote executed by the father alone after partition with his sons, in renewal of a note executed by him as manager of the family for a purpose binding on the family, the sons are not liable. A decree can only be given against the father and his share at the partition.

M. O. Parthasarathi Aiyangar, for the Appellants.

V. Ramadoss and *A. Krishnaswamy Aiyar*, for the Respondents.

Sir John Wallis, C. J.,
Kumaraswami Sastri, J.
1917, August 29.
A. S. Nos. 180 and 216 of 1909.

Hindu law—Partition—Partible zamindari—Agreement to receive an annual allowance—Whether effects partition—Filing a plaint in a partition suit—Whether an unambiguous expression to be separate—Government of India Act, S. 101 (2)—Appointment of temporary judges from time to time—Legality of.

Where a junior member of a partible zamindari enters into an agreement with the senior member by which the former agrees not to claim any share for himself so that the zamindari may continue intact and he is to be paid a fixed annual allowance.

Held, that the agreement did not amount to a release of all his rights in the zamindari except maintenance and that he continued a member of the joint family entitled to partition.

20 M. 256 followed.

The filing of a plaint in a suit for partition by a member of a joint family does not always effect a severance of the co-parcenary. If the suit is withdrawn, it negatives an intention to be divided. The filing of a plaint is only a revocable expression of intention to be separate.

Under S. 101 (2) of the Government of India Act the power of the Governor-General in Council is not restricted to appointing additional Judges only for one term. On the other hand additional Judges may be appointed from time to time as occasions require.

The Hon'ble the Advocate-General, K. Raja Aiyar and *N. R. K. Tatachariar* for the Appellants.

T. R. Ramachandra Aiyar, T. Rangachariar, B. Sitarama Rao, and *S. Muthia Mudaliar* for the Respondents.

Sadasiva Aiyar, J.,
Phillips, J.
1917, August 31.

S. A. No. 143 of 1916.

Appropriation of payments—Payments by mortgagor—Mortgagee has the right of appropriating at a later date even by plaint.

Where a mortgagor pays amounts due under the mortgage and he does not appropriate them to the principal or interest, the mortgagee is not bound to appropriate the sums at the time of their receipt to the principal or interest. He can do so at any later date even in the plaint in a suit on the mortgage.

V. Ramesam, for the Appellants.

N. C. Vijiaraghavachariar, for the Respondents.

NOTES OF RECENT CASES.

Abdur Rahim and Oldfield, JJ. 1917, August 29. — S. A. No. 338 of 1916.

Transfer of Property Act, S. 51—Hindu Law — Joint family—Manager—Sale of family property—Sale set aside at instance of co-parcener on ground that alienee knew that there was no necessity for it—Alienee's right to value of improvements —Liability for mesne profits—Extent of.

Where a sale by the manager of a joint Hindu family of immoveable property belonging to the family is set aside at the instance of a co-parcener on the ground that the alienee knew that there was no necessity for the sale, the alienee is not entitled to be paid the value of the improvements that he has effected on the property.

32 M. 530, followed; 1 L. W. 369, doubted; A. S. 354 of 1916, explained.

The alienee in such a case is bound to pay mesne profits from the date of his taking possession of the property and not merely from the date of the co-parcener's suit or of his depositing into Court the portion of the consideration for the sale found to be binding upon him.

39 A. 61, not followed.

P. V. Parameswara Iyer and *C. V. Anantakrishna Aiyar* for Appellant.

H. Balakrishna Rao for Respondent.

Sadasiva Aiyar and Phillips, JJ. 1917, August 31. — S. A. No. 418 of 1916.

Malabar Compensation for Tenants Improvements Act I of 1900—Improvements— Tender before suit of value eventually found to be due—Tenant's liability for mesne profits from date of tender—His right to possession till eviction in execution of decree.

Under S. 5 of the Malabar Compensation for Tenants Improvements Act I of 1900 a tenant is entitled to remain in possession of his holding on the terms of his tenancy until he is actually

evicted in execution of a decree on payment of the money decreed for improvements.

Held, therefore that even in a case in which more than the amount eventually found to be due to the tenant for improvements was tendered before suit in addition to the mortgage money, the tenant was not liable for mesne profits from the date of such tender.

T. R. Ramachandra Aiyar and *M. N. Krishna Aiyar* for Appellants.

C. V. Anantakrishna Aiyar for Respondents.

Sir John Wallis, C. J.,
Kumaraswami Sastri, J. A. S. No. 201 of 1916.
1917, September 3.

Civil Procedure Code, S. 92—Bequest to a charity—Suit under S. 92 against the executrix for the bequest to the charity—Whether maintainable in the absence of an order for administration.

The plaintiffs with the permission of the Collector sued the executrix under a will treating her as trustee under S. 92, C. P. C. for a scheme and for recovering the properties bequeathed to a Girls' School to be founded by the executrix and the executrix pleaded that the liabilities of the testator exceeded his assets and that therefore there was no residue left for founding the charity and endowing it and that a suit under S. 92 is not maintainable by the persons representing the charity without first obtaining a direction for the administration of the estate and as under S. 92, C. P. C., third parties could not be impleaded and as the presence of the other legatees and alienees was necessary for an administration action, the suit was not maintainable.

Held, the plaintiffs representing one of the legatees under the will (the charity) cannot institute a suit under S. 92 without an order for administering the estate, and the present suit could not be converted into an administration action as the presence of the other legatees and assignees will be necessary for the same.

P. R. Ganapathi Aiyar and *V. Ramadoss,* for the Appellants.

V. Lakshmi Narayana for the Respondents.

NOTES OF RECENT CASES.

Spencer and Krishnan, JJ.
1917, September 4.
S. A. No. 1303 of 1915.

Landlord and Tenant—Zemindari Village—Tenant's right to fish in village tanks on payment of sum in addition to rent—Nature of enjoyment of right for 50 or 60 years—Effect—Presumption.

Where the tenants of a Zemindari Village claimed the right to fish in the Village tanks on payment of a small sum in addition to the rent and it was shown that they had enjoyed such right for over 50 or 60 years, *held* (1) that the right claimed was in the nature of a right in gross and not an easement and (2) that it was not one which could not be legally acquired on the ground that it was a right to fish without stint so as to destroy the subject-matter and that having regard to long usage the same could be validated by the presumption of a lawful origin or a lost agreement.

T. M. Krishnaswami Aiyar, for *A. Krishnaswami Aiyar*, for Appellant.

K. V. Krishnaswami Aiyar, and *K. V. Seshayyangar*, with him for Respondents.

Chief Justice and Kumaraswami Sastri, J.
1917, September 14.
A. S. No. 76 of 1916.

Contribution—Claim for—Nature of—Right to interest apart from provisions of Interest Act.

Claims for contribution are in the nature of claims for indemnity and carry interest apart from the provisions of the Interest Act.

15 Ch. D. 400 (421-2); 10 B. L. R. 352, foll.

T. M. Krishnaswami Aiyar for *A. Krishnaswami Aiyar*, for Appellants.

K. V. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar*, for Respondents.

Abdur Rahim and Oldfield, JJ.
1917, September 17.
C. M. S. A. No. 23 and 24 of 1917.

C. P. C.,—S. 37—"Court which passed the decree"—Meaning—Transfer of territorial jurisdiction after decree—Court

to which jurisdiction transferred—Application for execution subsequent to transfer must be to that court only.

Where a mortgage decree was passed by the Principal District Munsif's Court of Madura and subsequently the territorial jurisdiction over the mortgaged property was transferred to another Court, *held* that the latter Court was the "Court which passed the decree" within the meaning of S. 37 of the Code of Civil Procedure and that an application for execution made to the former Court subsequent to the date of the said transfer was not an application in accordance with law to the proper Court within the meaning of Art. 182 of the Limitation Act, 37 M. 462. followed.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishnaiyar* for Appellant.

T. Narasimhaiyangar (*V. Raghavachari with him.*) for Respondent.

Sadasivaiyar and Phillips, JJ.
1917, September 19.

S. A. No. 1496 of 1916.

Easements Act—S. 7 ill. (j)—Riparian user-Meaning—Right to store water in wells for irrigation—Riparian land—Meaning—Irrigation cess Act S., 2—Engagement—Meaning—Riparian facilities existing but not actually enjoyed at time of, Inam settlement.

Per Sadasivaiyar, J.

1. Riparian user for purposes of irrigation within the meaning of S. 7 ill. (j) of the Easements Act includes the right to store water in wells for purposes of irrigation.

2. Riparian land is land belonging to one owner within the watershed touching the bank and extending inwards to a reasonable extent, what is reasonable extent depending upon the facts of each case.

3. Engagement within the meaning of the Urlam case covers cases of riparian facilities existing though not actually enjoyed, at the time of the Inam settlement.

Dr. Pandalai for *T. Prakasam* for Appellant.

Govt. Pleader and S. K. Parathasarathy Iyengar for Respondent.

NOTES OF RECENT CASES.

Ayling and Seshagiri Aiyar, JJ. 1917, August 27. — A. S. No. 134 of 1911.

Limitation Act. S. 13—One of the defendants outside British India—Whether suit is saved against all or any of the defendants.

A suit against a number of defendants of whom one was outside British India when the suit could be instituted would be saved from limitation by such remaining outside British India only so far as that defendant is concerned under S. 13 of the Limitation Act. The suit against the others will be barred.

In this case their Lordships allowed an amendment of the plaint on appeal alleging the ground of exemption from limitation.

M. Patanjali Sastri for the Appellants.

S. Desikachariar and *S. D. Gopala Desikachariar* for the Respondents.

Bakewell, C. J. and Kumaraswami Sastri, J. 1917, September 12. — L. P. A. No. 47 of 1917.

Mahomedan Law—Spes successionis—Transfer of—Release by heir apparent during lifetime of propositus—Validity—Estoppel Applicability of rule of.

A release for consideration by a Mahomedan heir apparent during the lifetime of the propositus is no more than a transfer of a spes successionis and is not binding on the heir at law even if he survives the propositus. The transaction cannot be validated by recourse to any principle of estoppel.

A. Krishnaswami Aiyar and *T. Duraiswami Aiyar*, with *R. Srinivasaiyangar*, for Appellant.

C. V. Anantakrishna Aiyar (*Eroman Unni* with him) for Respondent.

Abdur Rahim and Oldfield, JJ. 1917, August 29. — C. R. P. No. 1322 of 1916.

Hindu Law—Partition—Unilateral declaration of intention to effect severance—Filing of plaint in suit for partition—Suit filed on behalf of minor—Effect.

The principle that a plaint in a partition suit is operative to effect a severance as a unilateral declaration of intention has no application to a case in which a suit is filed on behalf of a minor, especially when the suit is filed by a person who is not his legal guardian. The distinction is based on the principle that whereas in a suit by an adult co-parcener the Court has no option but to decree a partition, it is entirely discretionary on the part of the Court to direct or not a partition in a suit brought on behalf of a minor.

A. Krishnaswami Aiyar and (*B. C. Seshachella Iyer* with him) for Appellant.

N. S. Rangaswami Aiyangar for *T. Narasimha Aiyangar* for Respondent

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Ayling, Seshagiri Aiyar and Bakewell, JJJ. 1917, September 18. — S. A. No. 691 of 1916 (F. B.)

C. P. C. of 1908—Or. 21, R. 63—Suit by unsuccessful claimant—Alienation in favour of claimant—Plea of alienation being bad under S. 53 of Transfer of Property Act not open in defence.

In a suit under Or. 21, R. 63 of the Code of Civil Procedure by an unsuccessful claimant for a declaration that suit property by the defendant, belonged to him by virtue of an alienation thereof in his favour by its owner and that it was not liable to be attached in execution of a decree obtained against him by the defendant, *held* that the latter could not raise the plea that the alienation was bad under S. 53 of Transfer of Property Act on the ground of its having been made in fraud of creditors.

The question whether a representative suit to set aside the alienation was necessary was left open by their Lordships.

A. Krishnaswamy Aiyer, and *L. S. Veeraragava Aiyar* for Appellants.

V. C. Seshachariar for Respondent.

Abdur Rahim and Oldfield, JJ. 1917 September 18. — S. A. 595 of 1915.

Compromise decree—Minor—Fraud and collusion of the guardian ad litem—Compromise not beneficial to the minor—Whether can be set up in defence in a suit for the reliefs granted by the compromise decree,

Where in a suit against a minor represented by a guardian *ad litem*, the plaintiff and the guardian *ad litem* entered into a collusive and fraudulent compromise which was decreed after the sanction of the court had been obtained, in a suit for the reliefs granted by the compromise decree, *held* it is open to the minor to set up in defence the fraud and the collusion of the guardian *ad litem* and the non-beneficial nature of the compromise.

It is not necessary for the minor to set aside the decree by a separate suit of his own before pleading them in defence.

C. A. Seshagiri Sastri for *A. Krishnaswami Aiyar* for the Appellant.

A. Venkatarayaliah for the Respondent.

Ayling, Seshagiri Aiyar and Bakewell, JJ.
1917, September 19.

C. M. S. A. 128 of 1916 (F. B.)

C. P. Code, O. 41, Rule 5—Stay of execution by the Appellate Court — When takes effect as regards proceedings in execution in the First Court.

An order for stay of execution passed by the Appellate Court takes effect only after it is communicated to the Lower Court and does not oust the jurisdiction of the 1st court to execute its decree *eo instanti* the order is passed by the Appellate Court.

V. Ramesam for Appellant.

P. Narayanamurthi for Respondent.

The Chief Justice, Bakewell and Kumaraswami Sastri. JJ.
1917, September 19.

L. P. A. 266 of 1916.

Court of Wards Act—(Madras Act 1 of 1902), S. 41—Mortgage not notified to the Collector—Estate released from the Court of Wards—Whether mortgagee postponed to the other notified creditors.

Where an estate is taken under the management of the Court of Wards and a mortgagee has not notified his claim to the

Collector as required, his mortgage is not, after the release of the estate by the Court of Wards, postponed to the claims of the creditors who have notified.

S. 41 of the Court of Wards Act has no reference to the enforcement of claims against the estate after it is released by the Court of Wards.

T. Narasimha Aiyangar for Appellant.

L. Venkataraghava Aiyar for Respondent.

Chief Justice and Kumaraswami Sastri, J.
1917, September 19.

A. S. No. 84 of 1915.

Hindu Law—Joint family—Managing member and minor co-parceners—Right of managing member to appoint testamentary guardian for the property of the minor.

Their Lordships referred to a Full Bench, the question whether the manager of a joint Hindu family consisting of himself, his minor sons and minor undivided nephew can appoint by will, a guardian for the minor co-parceners in respect of the joint family property.

K. Srinivasa Aiyangar, C. Krishnamachariar and *S. Venugopala Chettiar* for Appellants.

T. R. Ramachandra Aiyar, G. S. Ramachandra Aiyar, T. Rangachariar, S. T. Srinivasagopalachariar and *V. Narasimha Aiyangar* for the several Respondents.

The Chief Justice, Bakewell and Kumarasami Sastri, JJ.
1917 September 20.

L. P. A. 261 of 1916 (F. B.)

Hindu Law—Joint family—Partnership between the manager and a stranger—Rights of the junior members of the family—Whether can claim a dissolution of the firm against the stranger.

Where the manager of a joint Hindu family enters into a partnership on behalf of the joint family with a stranger the manager alone must be deemed to be the partner of the Firm and not the other members of the family.

Even after the family becomes divided in status, any other co-parcener has not the right to sue for dissolution against the stranger partner. His only remedy is to sue for partition against the former manager to get a receiver appointed in the suit and leave the receiver to sue for dissolution if necessary.

B. Sitarama Row for *A. Krishnaswami Aiyar* for Appellant.

T. R. Venkatarama Sastri and *K. V. Krishnaswami Aiyar* for Respondent.

Chief Justice and Kumarasami Sastri, J. 1917, September 20. — A. S. 249 of 1916.

C. P. Code, S. 47, Or. 21—Rules 53 to 63—Attachment—Purchaser from judgment-debtor—Claim petition by—Claim allowed as attachment not subsisting at the date of Purchase—Subsequent suit by decree-holder to set aside the order if lies.

A purchaser from the judgment-debtor of properties attached by the decree-holder is a representative of the judgment-debtor and where the purchaser puts in a claim petition regarding those properties and the claim is allowed on the ground that the attachment did not subsist at the date of the purchase, the decree-holder's only remedy is by way of appeal against the order under S. 47 of C. P. Code. A suit by him to set aside the order allowing the Claim Petition is not maintainable. 34. M. 417; (1916), 1 M. W. N. 287; 3 L. W. 377 Dis. from.

C. V. Ananthakrishna Aiyar and *S. R. Muthusami Aiyar* for Appellant.

S. Desikachari for the Respondent.

Sir John Wallis, C. J. Bakewell, J. and Kumaraswami Sastri, J. 1917, September 21. — L. P. A. No. 283 of 1916.

Lis pendens—Co-defendants—Essentials necessary to constitute.

There is no *lis pendens* as between co-defendants unless there is contest and adjudication as between them, and such adjudication is necessary for giving relief to the plaintiff.

B. Sitaram Rao for Appellant.

Narasimhachariar and V. V. Srinivasa Iyengar for Respondent.

Sadasiva Aiyar and Phillips, JJ. 1917, September 21. — Crl. R. C. No. 332 of 1917.

Workman's Breach of Contract Act (XIII of 1859)—A person who has undertaken to supply coolies to an estate—Workmen, definition of.

Per Phillips, J.:—The term "Workmen" includes a person who has undertaken to do any work.

Per Sadasiva Aiyar, J.:—The term "workmen" within the meaning of the Act has only reference to one who has undertaken to do physical labour.

To come under the provisions of the Act a person should not only undertake to get work done by supplying coolies but also be a workman himself. 7 M. 100 foll.

The Public Prosecutor for the Crown.

NOTES OF RECENT CASES.

Ayling, J.,
Seshagiri Aiyar, J.
Bakewell, J.
1917, September 25.

(Full Bench.)
C. M. A. No. 137 of 1916.

Provincial Insolvency Act, S. 46—Special periods of limitation fixed by the Act—Whether subject to the general provisions of Limitation Act—Limitation Act, S. 29.

The special periods of limitation for appeal and petitions fixed by the Provincial Insolvency Act are not subject to the general provisions of the Limitation Act contained in Ss. 5 to 25 of the Limitation Act. The general provisions of the Limitation Act would have the effect of affecting the periods fixed by the special Act within the meaning of S. 29 of the Act if they are held to govern the special periods.

34 Mad., p, 505 followed.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for the Appellants.

Dr. Swaminathan for the Respondents.

Chief Justice and
Kumaraswami Sastri, J.
1917, October 2.

A. S. No. 125 of 1916.

Deed — Construction—Hindu Law—Widow — Sale-deed of husband's property—Description of executant as widow of deceased and guardian of alleged adopted son of his—Adoption invalid—Alienation for necessity— Binding nature on reversioners—Capacity in which deed executed.

Where after the death of a Hindu without issue, his widow put forward a boy as the adopted son of her husband, when in fact he was not, and executed a sale-deed in respect of the properties of her husband describing herself as his widow and as guardian of the alleged adopted son, but signing the deed as such guardian only, *held* that the widow must be deemed to have executed the deed in her capacity of widow and that if the sale was for purposes binding on the inheritance it would be binding on the reversioners.

34 A. 296 (P. C.) explained.

B. C. Seshachella Aiyar for Appellant.

Hon. T. Rangachariar and *R. N. Aiyangar* for Respondents.

Seshagiri Aiyar and Kumaraswami Sastriar, JJ.
1917, October 9.

S. A. No. 978 of 1915.

Easement—Right of way—Right in respect of plot A—Building on plot A and on plot B, contiguous to plot A and owned by same person—Owner's right to use way in respect of plot B.

In a case in which there was a grant of an unrestricted right of way to plot A, *held*, that its owner could not, by building a factory upon that plot and upon plot B, contiguous thereto and also owned by him, use the way for taking the products of the factory standing upon plot B.

B. Sitarama Rao for Appellants.

K. P. Lakshmana Rao for Respondents.

Phillips, and Krishnan, JJ.
1917, October 10.

C. M. A. Nos. 132 and 254 of 1917.

Penal Code—Ss. 199, 210—" Declaration receivable as evidence " in S. 199—" Satisfaction " of decree in S. 210—Meaning—Decree—Payment out of Court to decree-holder—Payment uncertified—Execution application for entire decree amount—False statement in—Arrest of judgment-debtor in execution—Sanction to prosecute decree-holder for offences under Ss. 199, 215, Penal Code—Validity.

Even an uncertified payment to the decree-holder amounts to a satisfaction of the decree within the meaning of S. 210, Penal Code.

A verified application for execution filed by the decree-holder is a declaration made or subscribed by him which the executing Court can receive as evidence of the facts therein stated and for false statements therein made the decree-holder can be convicted of an offence under S. 199, Penal Code.

Where, therefore, notwithstanding the payment to him of a portion of the decree amount, the payment not, however, being certified, the decree-holder filed a verified application stating that the entire decree still remained unsatisfied and prayed for the recovery of the entire decree amount in execution by the arrest of the judgment-debtor and procured his arrest, *held* that sanction

to prosecute the decree-holder for offences under Ss. 199, 210 of the Penal Code was rightly granted by the Courts below.

Hon. T. Rangachariar and *S. Visvanathaiyar* for Appellant.

A. Ramachandraiyar for *G.S. Ramachandraiyar* (*S. Rangachariar with him*) for Respondents.

Bakewell and Phillips, JJ. *1917, October 11.* — S. A. No. 1450 of 1914.

Transfer of Property Act—S. 98. Anomalous mortgage—Kanom deed executed after the Act—Clause providing for tenant holding demised property for ever after obtaining renewals every 12 years on payment of renewal fees—Validity—Clog on Equity of redemption.

Where in a document called a Kanom deed and executed after the Transfer of Property Act came into force there was a clause providing that the tenant was to hold the demised property for ever without surrendering after getting renewals every 12 years on payment of certain renewal fees, *held*, that the transaction was an anomalous mortgage within the meaning of S. 98 of the Transfer of Property Act and that the clause created a perpetual right and was not void as being a clog on the equity of redemption.

C. V. Anantakrishnaiyar for Appellant.

K. P. M. Menon and *A. S. Venku Aiyar* for Respondents.

Phillips and Krishnan, JJ. *1917, October 11.* — S. A. No. 360 of 1916.

Insolvency—Fraudulent transfer by insolvent within two years of—Suit by Official Receiver for annulment of—Onus of Proof—Suit instituted in ordinary Civil Court in pursuance of direction of Insolvency Court—Effect—Provincial Insolvency Act—S. 36 Rule, of onus under—Applicability.

S. 36 of the Provincial Insolvency Act places the Official Receiver applying to set aside a fraudulent transfer made by the Insolvent within 2 years of his bankruptcy in a position of advantage by throwing the onus on the transferee of proving that the transfer was one made in good faith and for valuable consideration. This position of advantage the Receiver does not lose merely because, in pursuance of the direction of the Insolvency

Court, he institutes a suit for the purpose in the ordinary Civil Courts.

P. Chenchiah and *T. Prakasam* for Appellant.

A. S. Viswanathaiyar and *A. Krishnaswami Aiyar* for Respondent.

Chief Justice and Ayling, J.
1917, October 11. } S. A. No. 1809 of 1915.

Mortgage—Priority—Prior and subsequent mortgages—Sale of mortgaged property to prior mortgagee—Direction in sale-deed for payment of portion of amount of second mortgage—Effect on prior mortgagee's right to priority in respect of his mortgage—Extent of right—Equities between prior and subsequent mortgagees.

Where property, subject to two mortgages was sold in favour of the prior mortgagee in lieu of his mortgage and in consideration of the prior mortgagee—Vendee paying off a portion of the amount due to the second mortgagee, *held*, in a suit by the second mortgagee to enforce his mortgage, that the prior mortgagee-vendee did not lose his right to keep alive his prior mortgage for his own benefit.

34 M. 119 distinguished.

Held further that the right of priority extended only to the principal amount of the prior mortgage and to interest thereon till the date of the sale to the prior mortgagee and that after the date thereof the prior mortgagee was not entitled to interest and was also not liable to account for the profits of the property realised by him.

C. V. Anantakrishnaiyar for Appellant.

T. R. Ramachandraiyar and *N. A. Krishnaiyar* for Respondents,

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NOTES OF RECENT CASES.

Sadasiva Aiyar and Bakewell, JJ.
1917, October, 12.

C. M. A No. 48 of 1917.

Provincial Insolvency Act, S. 36—Fraudulent transfer—Application for annulment—Jurisdiction to grant consequential reliefs—Appeal against order under S. 36—Appeal filed out of time—Jurisdiction of Appellate Court to excuse delay—Conversion of appeal into Revision Petition—Practice.

Where, on an application under S. 36 of the Provincial Insolvency Act for the annulment of a deed of transfer executed by the insolvent in favour of the respondent of a mortgage bond executed in favour of the insolvent by a third party, the court found the transfer to have been fraudulent and ordered that the respondent (who had by that time collected the amount of the mortgage) should place the said amount with interest in the hands of the official Receiver within a fortnight of his receipt of the order and that in case of failure the official Receiver should be at liberty to execute the order in the manner of a decree, *held* that the court had no jurisdiction to order the payment of the amount by the respondent and to give liberty to the Receiver to recover the same in execution in default. That portion of the order was accordingly struck out.

In this case the respondent took the preliminary objection that the appeal was liable to be dismissed because it had been filed 4 days out of time and that, under the recent full Bench ruling, the court had no jurisdiction to excuse the delay. Their Lordships allowed the objection but, following 39 M. 593, converted the appeal into a Revision Petition.

Chief Justice, Ayling and Kumaraswami Sastriar, JJ.
1917, October, 12.

(Full Bench.)
S. A. No. 1672 of 1915.

Transfer of Property Act, Ss. 67, 68—Usufructuary mortgagee. Failure to place mortgagee in possession—Mortgagee's right to sue for recovery of mortgage by sale of properties.

Held, that a usufructuary mortgagee who was not placed in possession of the mortgaged properties could sue for the recovery

of the mortgage money by sale of the mortgaged properties under Ss. 67 and 68 of the Transfer of Property Act.

V. Ramadoss for Appellant.

K. V. L. Narasimham for Respondents.

Chief Justice, Ayling and Kumaraswami Sastriar, J.
1917, October, 16.

(Full Bench.)
L. P. A. No. 36 of 1917.

Agreement—Validity—Public Policy—Vakil's clerk—Agreement with master's client for remuneration for taking special care of client's case—Validity.

Held, that an agreement entered into by a Vakil's clerk with his master's client stipulating for a remuneration to himself in consideration of his paying special attention to the client's case was void as being opposed to public policy.

Ex parte Cotton 50 E. R. 285, followed.

P. Nagabhushanam for Appellant.

V. Ramadoss for Respondent.

Ayling and Phillips, JJ.
1917, October, 19.

S. A. No. 1399 of 1916.

Mortgage—Post diem *interest—Absence of provision for—Award of such interest—Jurisdiction of court—Suit for sale on mortgage*—Post diem *interest claimed as damages for breach of contract—Limitation—Limitation Act of 1908—Arts. 116, 132—Applicability.*

In a suit for sale on a mortgage which contained a stipulation that the principal was to be repaid in 2 years with interest at 12 % per annum and did not make any provision for *post diem* interest, the plaintiff claimed *post diem* interest as damages for breach of contract. *Held* that (1) even in the absence of a provision for *post diem* interest, the court was competent to award it, and (2) Art. 132 and not Art. 116 was applicable to the claim for such interest though the plaintiff claimed it only as damages for breach of contract.

P. S. Narayanaswami Aiyar for Appellant.

S. T. Srinivasa Gopala Chariar for Respondent.

Sadasiva Aiyar and Bakewell, JJ.
1917, October 23.

C. M. A. No. 129 of 1917.

Decree—Assignment—Assignees' right to execute—Assignee benamidar for third party—Effect—Benamidar when trustee.

An assignee of a decree can execute the decree even though the assignment is benami for a third party Circumstances in which a benamidar will be held to be a trustee discussed.

K. V. Krishnaswami Aiyar for Appellant.

T. Rangaramanuja Chariar for Respondent.

Seshagiri Aiyar and Napier, JJ.
1917, October 25.

S. A. No. 219 of 1916.

Civil Procedure Code of 1882, S. 257 A—Applicability of prohibition of—Contract entered into by third party—Validity.

The prohibition contained in S. 257 A of the Code of Civil Procedure, 1882, applies only as between parties to the decree and persons who will be bound by the decree though not parties. A contract entered into by a third party is not void under the section. 8 M. L. T. 326 followed, 26 M. 19 distinguished.

A. Krishnaswami Aiyar and *T. M. Ramaswami Aiyar* for Appellant.

K. V. Krishnaswami Aiyar, E. S. Chidambaram Pillai, and *P. N. Marthandam Pillai* for Respondents.

Seshagiri Aiyar and Napier, JJ.
1917, October 25.

S. A. No, 1135 of 1916.

Transfer of Property Act, S. 72 (c)—Expenses incurred by the mortgagee in defending the title of the mortgagor—Agreement by mortgagor to pay the amount—Whether a separate suit is maintainable — Agreement by guardian to pay the amount advanced for purposes binding on the minor—Whether minor bound by.

The remedy provided for in S. 72 (c) of the Transfer of Property Act is not the sole and exclusive remedy open to the usufructuary mortgagee and there is nothing to prevent him from filing a separate suit for recovering the expenses incurred by him in defending the mortgagor's title.

An express covenant on the part of the mortgagor to reimburse the mortgagee is enforcible in law by a separate suit.

9 M. L. J. 177 dissented from.

A simple promise or a bond (Varthamanam) by which the guardian of a minor agreed to pay the amount expended for purposes binding on the minor's estate stands on the same footing as a charge created by the guardian. There is no distinction between a charge and any other contract.

K. Jaganatha Aiyar for the Appellants.

A. Krishnaswami Aiyar and *K. Balasubramania Aiyar* for the Respondents.

Sir John Wallis, C. J.,
Kumarasami Sastri, J.
1917, October, 25.

A. S. No. 337 of 1916.

Madras Estates Land Act, S. 3 (2) (d)—Inam—Inam whether of the Melwaram or the Kudiwaram—Presumption—Burden of proof—Inam to a person not owning the kudiwaram.

Where a large number of villages were held on an Estate on a Subordinate tenure under a Zamindar and subsequently the Government resumed the Subordinate Estate and settled the different villages on Inam tenure with the alienees in possession, the facts are sufficient to find that the Inamdar was only the owner of the Melwaram like the original tenure holder of the Estate and that he was not the owner of the kudiwaram at the date of the grant.

1910 M. W. N. p. 639 is not intended to lay down any inflexible rule of burden of proof but was only meant to be a decision on the facts of the case.

P. Narayana Murti and *C. Ram Rau* for the Appellants.

V. Ramadoss for the Respondents.

NOTES OF RECENT CASES.

Sadasiva Aiyar and Bakewell, JJ. 1917, October 18. S. A. No. 743 of 1916.

Hindu Law—Joint family—Sale by manager—Suit to set aside by other co-parcener—Sale for Rs. 1,200—Rs. 805 thereof found to be binding on family—Decree to be passed.

Where, in a suit by a member of a joint Hindu family to set aside a sale of family property by the manager of the family, it appeared that out of the sum of Rs. 1,200, the consideration for the sale, Rs. 805 went towards the discharge of debts binding on the family, *held* that the proper decree to be passed was to uphold the sale in its entirety and to decree to the plaintiff his share of the consideration found to be not binding.

(1915) M. W. N. 8; 3 L. W. 413, followed.

T. Ethiraja Mudaliar for Appellant.

T. L. Venkataramaiyar for Respondent.

Chief Justice, Ayling and Kumaraswami Sastriar, JJ. 1917, October 26. L. P. A. No. 42 of 1917.

C. P. Code of 1908—Or. 21, Rules 71, 85 and 86—Execution sale—Property sold the subject at time of sale—of sale and of agreement to re-convey and auction-purchaser aware of same—Default of auction-purchaser to pay full amount of purchase-money—Re-sale in consequence—Expiry between dates of first sale and of re-sale of time fixed for payment by agreement to re-convey—Non-payment on date fixed—Consequent loss on re-sale—Auction-purchaser's liability for—Basis of.

Property, which was the subject of a sale and of an agreement to re-convey, was first sold in execution of a decree against the vendor. The auction-purchaser, who was, at the time of his purchase, aware of the sale, of the agreement to re-convey and of the date fixed by the latter for repayment, defaulted to pay the full amount of the purchase-money within the period prescribed by Or. 21, R. 85 of the code and the property was therefore re-sold under Or. 21, R. 86 of the code. The time fixed for payment by the agreement to re-convey expired between the dates of the original sale and of the re-sale and the property therefore fetched a considerably lower price at the re-sale. In an application under Or. 21, R. 71 of the code to recover from the auction-purchaser the loss consequent on such re-sale, *held* that the subject-matter of the re-sale was the same property as that which was originally

sold and that the auction-purchaser was liable for the loss occasioned by the re-sale.

K. Srinivasaiyangar for Appellant.

Hon. the Advocate-General for Respondents.

Chief Justice and Kumaraswami Sastri, J.
1917, October 30. — A. S. No. 343 of 1916.

Limitation Act, Art. 19—Acknowledgment—Authority—Partner—Acknowledgment of debt of firm—Validity—Absence of express authority—Authority if and when may be presumed.

In this case their Lordships referred to the Full Bench the question whether in a case in which one partner is not expressly authorised to acknowledge debts of the firm, such authority can be presumed from the facts of the case, including the fact that the partner by whom the acknowledgment was made was, at the time of such acknowledgment, the managing partner. Their Lordships inclined to the view that the authority might be so presumed.

V. Ramadoss, (K. G. Sarangarajaiyangar with him) for Appellant.

T. Ramachandra Row for Respondent.

Chief Justice and Kumaraswami Sastri, J.
1917, November 1. — A S. No. 221 of 1916.

Limitation—Usufructuary mortgage—Lease to mortgagor—Lease for one year—Registered deed of lease—Charge for rent—Holding over—Limitation Act, Arts. 116, 132.

Where under a usufructuary mortgage deed containing a covenant to pay the mortgagee was put in possession of the mortgaged property and on the same date as that of the mortgage deed the property was taken on lease by the mortgagor under a registered lease-deed which was for one year and which stipulated that the arrears of rent due under the lease-deed were to be a charge on the mortgaged property, *held*, in a suit for sale, that the mortgage and the lease were separate transactions and that the mortgagee was not entitled to a charge in respect of arrears of rent accrued due after the expiry of the year fixed by the lease-deed.

11 M. L. J. 186, followed.

K. P. Menon for Appellant.

C. Madhvan Nair and *P. S. Narayanaswami Aiyar*, for Respondents.

NOTES OF RECENT CASES.

Chief Justice, Ayling and Kumaraswami Sastriar, JJ.
1917 October, 26.

F. B.
S. A. No. 100 of 1917.

Res judicata—*Rule of—Applicability—Suit for possession and future profits—Decree for possession, nothing being said as to future profits—Fresh suit for such profits—Maintainability.*

Where, in a suit for the recovery of possession of certain property together with the profits thereof accrued due after date of suit, a decree was passed for possession, nothing being said therein as to the future profits claimed, *held* by Chief Justice and Kumaraswami Sastriar, J. (Ayling, J., dissenting) that a fresh suit for such future profits was not barred by *res judicata.*

2 L. W. 8 over-ruled.

C. V. Anantakrishnaiyar for Appellant.

S. T. Srinivasa Gopala Chariar for Respondent.

Seshagiri Aiyar and Napier, J.
1917 November, 30.

S. A. No. 846 of 1916.

Malabar Law—Kanom—Subsisting right of redemption under—Acknowledgment of, what amounts to—Execution of deed of sub-mortgage by kanomdar—Recital in deed that property sub-mortgaged was held by kanomdar on kanom—Effect.

Held that a recital in a deed of sub-mortgage executed by a kanomdar of the fact that the property, the subject of the sub-mortgage, was held by him (the kanomdar) on kanom from A was an acknowledgment by the kanomdar of a subsisting right of redemption in A.

C. V. Anantakrishnaiyar for Appellant.

K. V. K. Madhavan Nair and *P. V. Parameswaraiyar* for Respondents.

Ayling and Phillips, JJ.
1917, November 1st.

S. A. No. 1179 of 1916.

Contribution—Suit for—Plaintiff and defendant liable under promissory note—Amount of note borrowed for joint purchase of lands—Decree in suit on note and payment of amount

thereof by plaintiff—Point for determination in suit for contribution.

In a suit for contribution in respect of the amount paid by plaintiff to satisfy a decree passed against him and defendant on a promissory note executed by them both for a debt borrowed for the joint purchase of lands, the material point to be considered is the proportion in which the amount of the note was appropriated by the parties and not their rights in respect of the joint purchase of the lands with the aid of the amount so borrowed.

K. Jaganatha Aiyar (*S. Subramaniya Aiyar* with him) for Appellant.

P. S. Narayanaswami Aiyar for *C. V. Anantakrishna Iyar* for Respondent.

Sadasivaiyar and Bakewell, JJ. 1917, November 1. — C. M. S. A. Nos. 22 of 1916 and 337 of 1915.

Execution of decree—Attachment—Decree in suit against legal representatives—Attachment in execution of properties as those of deceased—Validity—Transfer of properties by deceased to legal representatives—Attachment on footing that transfer was fraudulent—Effect—Remedy of decree-holder in such cases

Where, in execution of a decree in a suit brought against certain persons as the legal representatives of A, the decree-holder attached certain properties as those of A ignoring a transfer thereof by him in favour of the said legal representatives on the ground that it was a fraudulent transfer, *held* that the attachment was not valid inasmuch as the transfer had not been previously set aside by suit and that therefore a claim to the properties put in by the legal representatives ought to be allowed.

C. V. Anantakrishna Aiyar and *P. V. Parameswara Aiyar*, for Appellant in C. M. S. A. 22.

T. R. Ramachandraiyar for Respondent in C. M. S. A. 22.

C. Madhavan Nair, T. R. Ramachandraiyar and *P. V. Parameswaraiyar* for Appellant in C. M. S. A. 337.

C. V. Anantakrishnaiyar for Respondent in C. M. S. A. 337.

NOTES OF RECENT CASES.

Ayling and Phillips, JJ.
1917, November 2.

S. A. No. 820 of 1915.

Insolvency—Adjudication—Vesting order—Insolvents right of suit in respect of property covered by order—Official receiver's assent to suit by insolvent—Effect.

After an order vesting property of an insolvent in the official Receiver, the insolvent cannot maintain a suit for the recovery thereof even though the official Receiver declines to institute the suit and allows the insolvent to do so if so advised.

T. R. Venkatarama Sastriar for Appellant.

S. T. Srinivasagopalachariar, K. Ramachandraiyar, K. Bhashyam Aiyangar for *A. Krishnaswami Aiyar* and *S. Panchapagesa Sastriar* for Respondents.

Chief Justice, Sadasiva Aiyar and Kumaraswami Sastriar, JJ.
1917, November 14.

L. P. A. No. 76 of 1917.

C. P. Code of 1908—Or. 23, R. 1—Withdrawal of suit with liberty—Application for—Order allowing withdrawal—Order not stating anything about liberty to bring fresh suit—Effect—Fresh suit—Maintainability.

Where in a suit plaintiff put in a petition praying for leave to withdraw from the suit with liberty to bring a fresh suit and the court made an order allowing plaintiff to withdraw from the suit without stating anything as to liberty to bring a fresh suit, *held,* that the order must be read with the petition on which it was passed and that the court must be deemed to have given liberty to bring a fresh suit.

Hon. T. Rangachariar for Appellant.

B. Sitarama Rao, H. Balakrishna Rao, K. Y. Adiga and *K. P. Lakshmana Rao* for Respondents.

Chief Justice and Kumaraswami Sastri, J.
1917, November 14.

A. S. No. 116 of 1916.

C.P.C. of 1908—S. 92—"Person having interest in the trust" Meaning—Hindu temple—Right to worship of Hindu—Natur

of—Person having such right but not having property at place where temple is situated nor permanently resident there if a person having interest in the temple.

In a suit under S. 92 of the Civil Procedure Code instituted with the sanction of the Advocate-General, the plea was raised that one of the plaintiffs was not a person "having an interest in the trust" within the meaning of the Section. The suit was for settling a scheme for the management of a Devaswom in North Malabar. The plaintiff, whose interest in the Devaswom was questioned, was a Hindu Brahmin born in the Cochin State, practising in Madras as a High Court Vakil, and having no property in the District of North Malabar but entitled, as a Hindu, to worship at the suit Devaswom and a very occasional worshipper at the said Devaswom. *Held* by the Chief Justice (Kumaraswami Sastriar, J. dissenting) that the plaintiff in question was not a person having an interest in the Devaswom within the meaning of S. 92 of the Code and that the Court below had rightly held the suit to be incompetent.

Per Kumaraswami Sastriar, J. The right of every Hindu to worship at a Hindu temple is a vested and not a mere contingent right and a person having such a right is a person having an interest in the temple within the meaning of S. 92 of the Code.

P. R. Ganapati Aiyar and *T. R. Krishnaswami Aiyar*, for Appellants.

K. P. M. Menon, A. Sundaram and *K. Govinda Marar* for Respondents.

Chief Justice and Oldfield, J. 1917, November 14. — S. A. No. 252 of 1916.

Madras Irrigation Cess Act—"River belonging to Government"—Maruda river if a, where it flows through kannivadi Zamin limits.

In this case their Lordships referred to the Full Bench the question whether the river Maruda is, where it flows through the kannivadi zamin limits, a river belonging to the Government within the meaning of the Irrigation Cess Act.

K. S. Ramabhadra Aiyar for Appellant.

The Government Pleader for Respondent.

Seshagiri Aiyar and Napier, JJ.
1917, November 15.

S. A. No. 1510 of 1916.

Hindu Widows' Re-Marriage Act, (XV of 1856)—S. 2—Applicability and Scope—Hindu widow inheriting property of husband—Conversion to another religion—Subsequent re-marriage—Effect on her right to property of Hindu husband—Alienation by her of such property twenty years after re-marriage—Suit by reversionary heirs of Hindu husband for declaration of its invalidity—Maintainability:

Act XV of 1856 applies only to a widow who continues to be a Hindu at the date of her re-marriage and has no application to a widow who has, before the date of such re-marriage, become a convert to another religion.

Where, therefore, a Hindu widow, who had succeeded to the estate of her husband, became a convert to Mahomedanism, then married a Mahomedan and 20 years after the re-marriage alienated the property of her Hindu husband, *held*, in a suit by the reversionary heirs of the Hindu husband for a declaration of the invalidity of such alienation beyond the lifetime of the widow, that (a) the widow had not, at the date of the alienation, acquired an absolute title to the property by adverse possession by virtue of the provisions of S. 2 of the Act and (b) the property was, at the date of such alienation, held by the widow in her capacity of Hindu widow, the alienation was made by her as Hindu widow, and the plaintiffs were entitled to sue for a declaration of its invalidity.

B. Somayya for Appellant.

Mir Sultan Mohideen for Respondent.

Chief Justice, Sadasiva Aiyar and Kumaraswami Sastriar, JJ.
1917, November 21.

C. M. S. A. No. 132 of 1916.

C. P. Code, S. 47—"Party to suit"—Exonerated party if a—Mortgage—Suit for sale by prior mortgagee—Mortgagor and subsequent mortgagee made defendants—Plaintiff abandoning claim on mortgage and obtaining money decree against mortgagor—Exoneration of subsequent mortgagee—Effect—Service Inam—Alienation—Validity—Alienation after issue of inam

patta but before issue of notification under S. 17 of Madras Act II of 1894—Effect—Transfer of Property Act, S. 43—Applicability to such cases.

Where a prior mortgagee instituted a suit for sale on his mortgage, making the mortgagor and the subsequent mortgagee parties-defendants, but subsequently abandoned his claim on the mortgage and obtained a money-decree against the mortgagor as a result of which the subsequent mortgagee was exonerated from the suit, *held* that the subsequent mortgagee was nevertheless a "party to the suit" within the meaning of S. 47 of the Code of Civil Procedure.

An alienation (mortgage) of a village service Inam made after the issue, in the course of the enfranchisement thereof, of an inam patta to the service holder but before the date of the notification required by S. 17 of Madras Act II of 1894, is invalid as being forbidden by law and S. 43 of the Transfer of Property Act cannot be invoked in aid of such alienation.

Hon. B. N. Sarma (*K. Aravamudu Aiyangar* with him) for Appellant.

P. Narayanamurthi (*T. Rama Row* with him) for Respondents.

NOTES OF RECENT CASES.

Abdur Rahim and Oldfield, JJ. | A. S. No. 53 of 1917.
1917, November 15.

Limitation Act, Art. 181—Application for decree absolute in a mortgagee's suit for sale—Priliminary decree by Appellate Court.

Art. 181 of the Limitation Act, applies for a decree absolute in a mortgagee's suit for sale and the time runs under that article from the date of the appellate decree even if the preliminary decree was passed by the Appellate Court confirming the decision of the lower Court as the decree of the first Court is merged in that of the Appellate Court.

T. V. Muthukrishna Aiyar and *K. S. Jayarama Aiyar* for the Appellants.

Hon. T. Rangachariar, P. S. Vaidyanatha Aiyar and *M. S. Venkatarama Aiyar* for the Respondents.

Abdur Rahim and Oldfield, JJ. | A. S. Nos. 92 and 93 of 1915.
1917, November 19.

Limitation Act, Ss. 19, 21—Acknowledgment—Appointment of a receiver pending a suit for dissolution—Receiver appointed to collect and preserve the partnership assets—Acknowledgment by receiver—Whether saves limitation.

S. 19 of the Limitation Act is not restricted to merely agents appointed under a contract with the principal but also extends to persons appointed agents under any statute; and also to receivers under proper circumstances.

26 Bom. 221, foll.

Where a receiver is appointed pending a suit for dissolution of partnership for collecting and preserving the partnership assets, an acknowledgment by such receiver under circumstances requisite for preserving the partnership assets will save the bar of limitation under S. 19 of the Limitation Act.

34 M. 211, foll.

K. Srinivasa Aiyangar and *C. Krishnamachariar* for the Appellant.

S. T. Srinivasa Gopalachariar and *C. A. Seshagiri Sastri* for *K. V. Krishnaswami Aiyar* for the Respondents.

Abdur Rahim and Oldfield, JJ. *1917, November 21.* — A. S. No. 209 of 1916.

Practice—Costs—Second Counsel's fee—Power of the High Court or the Appellate Court to award—Rules of Practice, Appellate side Rule 41 (Appendix II).

Their Lordships allowed a second counsel's fee as part of the costs in the appeal under Rule 41 of the Rules of the Appellate side, having regard to the heavy value of the subject-matter involved *viz.* six lakhs of rupees though the case was not one of special difficulty and the respondent's counsel was not called upon.

P. Narayanamurthi and *M. Patanjali Sastri* for the Appellants, *K. Srinivasa Aiyangar, D. Appa Row, V. Ramesam, T. Ramachandra Row, B. Somayya* and *M. Krishnamarazu* for Respondents.

The Chief Justice, Sadasiva Aiyar and Kumaraswami Sastri, JJ. *1917, November 21.* — [Full Bench.] C. R. P. No. 1248 of 1916.

Civil Procedure Code, O. 9 and O. 17, Rr. 2 and 3—Default of appearance by party, on a date to which suit is adjourned for evidence—Provision of O. 17, Rr. 2 and 3, mutually exclusive.

Where a party fails to appear on a day to which a suit is adjourned for evidence, the court ought to proceed under R. 2 and not under R. 3. of O. 17.

The provisions of Rr. 2 and 3 of O. 17 are mutually exclusive and the provisions of R. 2 ought to be exhausted before resorting to R. 3.

33 M 341, foll.

34 M. 97 over ruled.

B. Narasimha Row for the Appellant.

P. Somasundaram for the Respondents.